S. Hrg. 100-110

THE ABM TREATY AND THE CONSTITUTION

JOINT HEARINGS

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS

AND THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

MARCH 11, 26, AND APRIL 29, 1987

Printed for the use of the Committee on Foreign Relations

U.S. GOVERNMENT PRINTING OFFICE
73-839 WASHINGTON : 1987

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S521-51
S381-15

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PREFACE

We wish to express particular appreciation to the following persons for their assistance in the preparation of these hearings and for their consultation in the drafting of Senate Resolution 167, "The ABM Treaty Interpretation Resolution":

Professor Abram Chayes of Harvard University;

Professor Michael Glennon of the University of California, Davis;

Professor Louis Henkin of Columbia University;

Mr. James Rubin, research director for the Arms Control Association;

Professor Laurence Tribe of Harvard University; and

Professor Seth Tillman of Georgetown University.

On May 19, 1987, the Foreign Relations Committee voted to report the ABM Treaty Interpretation Resolution to the Senate with a favorable recommendation. The Committee Report on S. Res. 167 analyzes the issues involved.

JOSEPH R. BIDEN, Jr.,
Chairman, Committee on the Judiciary.
CLAIBORNE PELL,
Chairman, Committee on Foreign Relations.

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THE ABM TREATY AND THE CONSTITUTION

WEDNESDAY, MARCH 11, 1987

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
AND
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committees met at 10:07 a.m., in room SR–325, Russell Senate Office Building, Hon. Claiborne Pell (chairman of the Committee on Foreign Relations) and Hon. Joseph Biden (chairman of the Committee on the Judiciary), jointly presiding.

Present: From the Committee on Foreign Relations: Senators Pell, Sarbanes, Kerry, Simon, Adams, Helms, Kassebaum, Pressler, Trible, Evans, and McConnell; from the Committee on the Judiciary: Senators Biden, Thurmond, Hatch, Grassley, Specter, and Humphrey.

Chairman PELL. This joint hearing of the Committee on Foreign Relations and the Committee on the Judiciary will come to order.

We are holding this joint hearing on a treaty of central importance to our national security, the 1972 Anti-Ballistic Missile Treaty.

I am delighted that Senator Biden and I are cochairing this hearing, which will review the Senate consideration of that treaty and the constitutional implications of it.

As a participant in the Foreign Relations Committee deliberations—in fact, I believe I am the only Senator remaining on the committee who was a member of it in 1972—I must say, quite frankly, that my own recollection is that the so-called traditional view of the limitations of the treaty is correct.

We understood clearly then that the treaty bans deployment of nationwide ABM systems, allows research on all kinds of ABM systems, but bans development, testing, and deployment, without exception, of "sea-based, air-based, space-based, or mobile land-based" systems. Limited development and testing is allowed in the case of one type of ABM alone—fixed, land-based systems.

To my mind, we can understand the current debate over "narrow" versus "broad" interpretations more clearly if we would examine the motives of those who would undo it. Moreover, we should be extremely wary, particularly in this time for arms control, of undoing a treaty which has become pretty crucial to strategic deterrence.

Our witnesses today will be Gen. Royal Allison and Mr. Raymond Garthoff, both former members of the SALT I negotiating team; a former chairman of our committee, Senator J.W. Fulbright;

and Senator Pete Wilson of California, who has reviewed the negotiating record; and then three constitutional scholars: Prof. Laurence Tribe, of Harvard; Prof. Louis Henkin, of Columbia; and Prof. Gordon Baldwin of the University of Wisconsin.

At a session this afternoon at 2 o'clock, the chairman of the Committee on Armed Services, Senator Sam Nunn, who has reviewed in depth the negotiating record, will appear.

At this time, I would add that I think we may have to limit our questioning to only 5 minutes or so, because of the number of witnesses and the number of Senators who are here.

Senator Biden.

Chairman **Biden**. Thank you, Mr. Chairman.

Senator Pell and I agreed on the need for joint hearings on the ABM Treaty because, since 1985, the administration has, through its so-called "broad" interpretation of the treaty moved slowly but inexorably toward a constitutional confrontation with the U.S. Senate. The time has come for the Senate to be heard.

Coincident with these hearings, I am today introducing the "ABM Treaty Interpretation Resolution", designed to provide a vehicle for the Senate to make a formal and forceful statement concerning the treaty power in general and the ABM Treaty in particular. Copies of that resolution and an accompanying floor statement are available.

These hearings will treat thoroughly the issues involved and will, I believe, establish the basis for action on the resolution. We will elicit testimony in three phases on these basic questions:

First, what did President Nixon's negotiators agree with the Soviets in the ABM Treaty; but, even more importantly, what interpretation of that treaty did they present to the Senate?

Second, what did the Senate believe it was agreeing to on behalf of the American people in consenting to ratification?

Third, can a President proceed to reinterpret the treaty so as to implement a program—in this case the SDI Program, Star Wars—in complete contravention of the clear understanding of the executive branch and the U.S. Senate in the year 1972?

This hearing I believe will confirm that the treaty text, the interpretation of the treaty as presented by the executive branch, and the meaning as understood by the Senate were harmonious. They will, I believe, establish further that during the life of the treaty the Constitution permits that interpretation and only that interpretation, unless the treaty is formally amended with the advice and consent of the U.S. Senate.

In recent weeks, public attention has focused on the significance of the treaty's negotiating record. This was inevitable since the administration cited that record in justifying the so-called reinterpretation and then proceeded to deny Senate requests for access to that record. The impression created was that the negotiating record held a decisive significance as to the proper interpretation of this treaty.

To accept that proposition, however, was to take a bite out of the administration's apple. For as the resolution states, and as I believe this hearing will underscore, when the meaning of a treaty is otherwise clear, anything not transmitted to the U.S. Senate during the consideration of a treaty, including the negotiating record, is not relevant to the meaning of that treaty. A treaty is a contract, and where there is a meeting of the minds, the agreement is binding. It was binding on President Nixon, who signed it, and every one of his successors, including President Reagan.

We cannot change the rules in the middle of the game simply by ordering lawyers of the State Department to find some loophole, as if they were high-paid counsel to some tycoon who wants to welsh on a bad deal. Besides, the ABM Treaty was not a bad deal. It was not a suicide pact. It was a carefully calculated means of protecting our national security by preventing a spiralling competition in nuclear weapons and by providing the foundation for reductions in those nuclear weapons. Without a reaffirmed ABM Treaty, there will be no reductions in strategic nuclear weapons.

In 1985, the administration's self-imposed dilemma—of trying to implement its Star Wars plan while pretending to honor an ABM Treaty expressly designed to prevent precisely that—was delivered into the hands of the lawyers. They were told to find a loophole, and clearly they have labored mightily to serve their clients. But their efforts have produced an argument that is neither constitutionally nor logically persuasive.

Is it conceivable that, in the early 1970s, a team of distinguished and highly intelligent American public servants, laboring for 2 years to enhance this Nation's military security, would produce an ABM Treaty so illogical in construction and so useless in attaining its expressed goals as this administration and its lawyers would now allege? The accusation that this failure occurred and that it somehow went unnoticed for 13 years insults not only the negotiators of the treaty and the Senate of that period, but also those expected to be duped by this sophistry today. Those involved in the creation of the ABM Treaty who now associate themselves with the "reinterpretation" apparently have a chameleon-like capacity for conformity with political fashion.

Efforts to implement the so-called reinterpretation would constitute a direct challenge to the Constitution's delineation of treaty power. In the event of such a challenge, the Senate would face the question of recourse. One technique, that of legislating compliance with the treaty's correct interpretation, could be effective on a policy level, but would fail to meet the constitutional issue head-on. On the other hand, to bring the issue to resolution in the courts, to render the question "justiciable," would be complex and time consuming. It is therefore important, both to avoid court action if possible, and to provide a basis for such action if necessary, that the Senate speak clearly and forcefully at this early point. Passage of the ABM Treaty Interpretation Resolution would provide such a statement by the Senate.

What is at issue here is decidedly not a lawyer's quarrel. We are witnessing a major assault on the premises and structure of a national nuclear strategy which, for decades, was supported overwhelmingly by the Senate, which was reaffirmed only 2 days ago by six former Secretaries of Defense, but which has been brought to issue by this administration.

We are also witnessing a subtle, but equally significant, assault on the Constitution's allocation of the treaty power. My colleagues in the Senate may disagree on the wisdom of continuing the national strategy embodied in the ABM Treaty, although I believe that a substantial majority remain convinced that a reaffirmed ABM Treaty offers the most reliable means of protecting this Nation in the years ahead. Where I hope all of my colleagues would agree, however, is on the imperative of upholding the constitutional responsibilities of the U.S. Senate as reposed in this body by the Founding Fathers.

That is our subject today.

Chairman Pell and I, as chairman of the Judiciary Committee, invite differing points of view on all three questions we will discuss today. In this regard, the committees will continue these hearings on March 26, at which time administration spokespersons will appear.

I thank my colleague, Senator Pell.

Senator Thurmond, do you have an opening statement?

Senator THURMOND. I do not have an opening statement, thank you.

Chairman BIDEN. Senator Specter.

Senator SPECTER. Yes, Mr. Chairman. Thank you.

First, I commend Senator Biden and Senator Pell on convening these hearings. I have a few observations by way of an opening statement.

In our consideration of narrow versus broad interpretations of the ABM Treaty, it is my thought that we should not lose site of the central issue, which is arms control and the avoidance of an arms race in outer space; and narrow versus broad may not be central to that question.

The weekend before last, a group of Senators in the observer team at Geneva discussed these issues with the United States delegation and also the Soviet delegation, and the central issue there, so far as the negotiators were concerned, including the Soviet's Minister Vorontsov, was not a focus on narrow versus broad, but a concern for the specifics as to what the United States may have wanted to test.

Minister Vorontsov made the reference that the concern on testing would arise if the United States put 100 space stations, had a test, and then was in a position to deploy. That was something to which the Soviets strongly objected.

But there was no focus of attention on whether we were going to have a narrow-versus-broad interpretation.

A statement which had been issued the previous Saturday night by Secretary General Gorbachev contained a concern about deployment, and the issue was raised that it may have been that in Gorbachev's concern about deployment, there was a negative implication that some testing would be permitted within the Soviet view of the ABM Treaty.

In my view, we should be careful not to divert the public and congressional focus from the real issue, which is the avoidance of an arms race in outer space, and ought to focus on that most decisively.

On the issue of the Senate's understanding of the treaty, or the Senate intent, or perhaps stated as the Senate's state of mind, I would like to express at this time the concerns that this Senator has about reviewing some of the documents.

In my efforts to review what happened in hearings before the Armed Services Committee in 1972, I find that only Senators can review what was done in executive session. It is not realistic to pore through those records personally. We ought to have access to staff on that subject.

There is a similar problem in the review of the negotiating record, where that is limited to 6 staff members and the 100 Senators. There, again, the reality is that there has to be staff access to those documents if we are to be in a position to conduct these hearings and to proceed.

One other concern that I would like to express is that, as we hear the witnesses today, it may be that we will need to talk about some facets of the negotiating record which are classified, and if it is germane as to what Lieutenant General Allison or Ambassador Garthoff viewed at the time the negotiations occurred, there may well be some examination necessary as to contemporaneous documents to which they were a party, or to which others associated with them were a party.

I raise that at this time because it may be necessary that some of those questions be conducted in executive session if we are not to be permitted to raise those questions in a public hearing.

Thank you, Mr. Chairman.

Chairman PELL. Thank you.

General Allison, I believe you are the first to be with us. We welcome you very much, indeed.

Please proceed as you would.

Chairman BIDEN. General, before you proceed, maybe the Ambassador could join you at the table also and we could hear from both of you in succession before we begin our questions. The temptation may be too great otherwise for us to start with questions.

STATEMENT OF LT. GEN. ROYAL B. ALLISON (USAF-RET.), MEMBER, U.S. ABM TREATY NEGOTIATING DELEGATION

General ALLISON. Thank you, Mr. Chairman. It is a pleasure to have Ambassador Garthoff here with me.

I have a rather brief prepared statement, which I would like to read and enter into the record. Then, of course, I am available to answer any questions which you may put to me.

I am Royal B. Allison, Lieutenant General, U.S. Air Force, retired.

In 1969, President Nixon appointed me a principal delegate on the delegation organized to negotiate strategic arms limitations with the Soviet Union. The delegation was headed by Ambassador Gerard C. Smith. Other delegates initially appointed were Ambassador Philip J. Farley, as alternate chairman of the delegation; Ambassador Llewellyn Thompson; the Honorable Paul Nitze; and the Honorable Harold Brown.

Subsequently, Ambassador Thompson left the delegation, and Ambassador J. Graham Parsons was appointed in his stead.

The United States and Soviet delegations entered what became known as SALT I negotiations in Helsinki, Finland, in November 1969. From that point forward until conclusion of the SALT I negotiations in Helsinki, in May 1972, negotiations alternated between Helsinki and Vienna, Austria.

The result of the negotiation was the ABM Treaty and the Interim Agreement Limiting Strategic Offensive Arms, both of which were signed by President Nixon in Moscow on May 26, 1972.

Throughout this period, I was a principal delegate on the delegation and the senior U.S. military officer presenting the military position during the negotiations.

My military duty assignment during this time was that of Assistant to the Chairman, Joint Chiefs of Staff for Strategic Arms Negotiations.

Throughout the negotiations which led to the ABM Treaty, the U.S. military position was that a treaty must be based primarily on quantitative limitations. This position recognized the important premise that we must not accept conditions which limit U.S. technology and U.S. inventiveness—that we must not accept limitations on research or on our technological capabilities because the capabilities of the United States to produce new and advanced technologies for application to our national defense has been, is, and will be of vital importance to our national security.

The military position was sustained on the United States side as the United States negotiating position and was sustained in treaty drafting in the negotiations with the Soviet Union. The resulting ABM Treaty permits research and research testing of new technologies for ballistic missile defenses.

On the other hand, the treaty does not permit going beyond the research and research testing phase. It clearly prohibits development, testing, and deployment of all space-based and other mobile ABM systems and components.

To take account of the possibility that new technologies and weapon applications might be developed through research and research testing, Agreed Interpretation D was included to provide an avenue for the parties to address such a situation with the view to negotiating and reaching agreement thereon in accordance with pertinent articles of the treaty.

I have in hand a statement by ABM Treaty negotiators which describes briefly our view, and I ask that it be included in the record of this hearing, along with my statement.

In closing, I wish to sum up my view on the matter of interpretation of the ABM Treaty.

First, it is clear in my mind that both the United States side and the Soviet side understood and agreed that the ABM Treaty permits research and research testing of ABM systems and components, including that based on new technologies and new physical principles, or the so-called exotics.

Second, it is clear in my mind that both the United States side and the Soviet side understood and agreed that, other than the actions and conditions permitted by articles III and VII of the treaty, the treaty prohibits development, testing, and deployment of ABM systems and components, including those based on other physical principles or so-called exotics, until such time as the process specified in Agreed Interpretation D shall take place.

Third, it is my recollection that, during the hearings in the U.S. Senate which preceded the overwhelmingly favorable vote for ratification of the treaty, the Senate was given, in essence, the interpretation I have just described.

Thank you.

Chairman **Pell**. The statement you requested will be made part of the record and your full statement will be inserted as if read.

Thank you.

[The negotiators' statement may be found in the appendix.]

Chairman **Pell**. Ambassador Garthoff.

STATEMENT OF HON. RAYMOND L. GARTHOFF, EXECUTIVE SECRETARY AND SENIOR ADVISER TO THE U.S. ABM TREATY NEGOTIATING DELEGATION

Ambassador **Garthoff**. Thank you, Mr. Chairman.

I am pleased to contribute to your hearing on this important subject.

For the record, let me note that I was the executive officer of the U.S. delegation throughout the SALT I negotiations, which resulted in the conclusion of the ABM Treaty.

I was also Deputy Director of the Bureau of Politico-Military Affairs in the Department of State and the Department of State representative on the verification panel working group, which developed positions for the negotiations that were then decided upon by the President after deliberations of the verification panel, and, occasionally, the National Security Council.

I was also one of the administration officials participating directly in the Senate hearings on the ABM Treaty.

Secretary of State William Rogers, in his letter of submittal to the President of June 10, 1972, presented to the Senate by President Richard Nixon on June 13, 1972, in his letter of transmittal, requesting the advice and consent of the Senate to the ratification of the ABM Treaty, noted that the treaty included provisions that "development, testing, and deployment of ABM systems or ABM components that are sea-based, air-based, space-based, or mobile land-based are prohibited," and, in addition, that "deployment of ABM systems involving new types of basic components to perform the current functions of ABM launchers, interceptors or radars is prohibited."

The two provisions, formally article V(1) and Agreed Interpretation D, were seen and presented as complementary, not with the latter modifying and diminishing the former.

The question now placed in issue by the attempt 13 years after the ratification of the treaty to reinterpret its meaning was not envisaged by anyone either supporting or opposing the treaty at the time and was, therefore, not addressed directly in the hearings in 1972.

There were, however, a number of statements made in the course of the hearings that bear on the issue. Some general statements were not precise on the point and, therefore, would not clearly rule out either the broad interpretation or the restrictive, traditional interpretation.

Other statements were unambiguously supportive of the restrictive interpretation, then unanimously held by the executive branch, including all of the negotiators.

None of the statements made asserted the so-called broad interpretation now advanced by the present administration.

I will cite brief excerpts from several of these statements and can supply fuller excerpts in the hearing or for the record, if the committees wish.

Chairman **Biden**. That would be useful.

Ambassador **Garthoff**. Secretary Rogers noted in the letter of submittal that article V(1) limits development and testing to "fixed land-based ABM systems and components by prohibiting the development, testing, or deployment of ABM systems or components which are sea-based, air-based, space-based, or mobile land-based."

He also explicitly made clear, in contradiction to the premise of the broad interpretation, that article II of the treaty defines ABM components functionally and not restrictively, explicitly referring to those named as "current."

The late Senator Henry Jackson, in the hearings, asked Dr. John Foster, Jr., Director of Defense Research and Engineering in the Department of Defense, whether the prohibition on development and testing of, for example, a laser ABM system applied, "if it is sea-based, air-based, space-based, or mobile land-based," but "if it is a fixed land-based ABM system, it is permitted, am I not correct? Dr. Foster: That is right."

Dr. Foster went on to state, "One cannot deploy a fixed land-based laser system, but you can develop and test up to the deployment phase the future ABM system components which are fixed and land-based."

I provide the citations from the Senate Armed Services Committee hearings [June 22, 1972, p. 275].

General Bruce Palmer, Jr., Acting Chief of Staff of the U.S. Army, in his testimony made several general and not precise statements concerning the limitation on development of ABM lasers, but clarified them in a way that made quite clear that the Joint Chiefs of Staff had carefully considered, understood, and accepted the restrictive interpretation.

He stated, and I quote,

> On the question of the ABM, the facts are that when the negotiations started, the only system actually under development in any meaningful sense was a fixed land-based system. As the negotiations proceeded and the position of each side became clear and each understood the other's objectives better, it came down to the point where, to have agreement, it appeared that—this is on the antiballistic missile side—this had to be confined to the fixed land-based system. The Chiefs were consulted. I would have to go to a closed session to state precisely the place and time. They were consulted on the question of qualitative limits on the ABM side and agreed to the limits you see in this treaty.

General Palmer also commented that the Chiefs had agreed to the treaty based on "a concept that does not prohibit the development in the fixed land-based ABM system. We can look at futuristic systems so long as they are fixed and land-based. Senator Jackson: I understand."

Chairman **Biden**. Would you repeat that, please?

Ambassador **Garthoff**. Yes.

General Palmer also commented that the Chiefs had agreed to the treaty based on

> a concept that does not prohibit the development in the fixed land-based ABM system. We can look at futuristic systems so long as they are fixed and land-based.

Senator Jackson: I understand. General Palmer: The Chiefs were aware of that and had agreed to that, and that was a fundamental part of the final agreement. [SASC hearings, July 19, 1972, p. 443].

Secretary of Defense Melvin Laird also stated in the hearing that, "The ABM Treaty specifically prohibits space-based ABM systems," citing the language of article V, banning the development, testing, or deployment of ABM systems or components which are sea-based, air-based, space-based, or mobile land-based. He explicitly noted that in contrast to the ban on development and testing of space-based and other ABM systems or components, "There are no restrictions on the development of lasers for fixed land-based ABM systems," making clear his understanding, which he, incidentally, also refers to as the "understanding of the U.S. side" [SASC hearings, June 6, 1972, pp. 39–41.]

Mr. Chairman, it is clear that the record reflects the judgment of the executive branch at the time that the restrictive interpretation of the ABM Treaty was the interpretation, the only interpretation, of the treaty as it was presented to the Senate for its advice and consent to ratification.

I will be happy to respond to any questions members of the committee may wish to ask.

I also might note that I have information concerning the Soviets' parliamentary ratification deliberations, which also I think make reasonably clear that their understanding at the time was the restrictive interpretation. But, since that goes beyond the scope of the hearings this morning, unless you wish, I would simply be happy to provide that for the record.

Chairman Pell. I would defer at this time to my colleague, Senator Biden, who not only is chairman of the Judiciary Committee but also is the ranking Democrat on the Foreign Relations Committee.

As far as questioning goes, would you agree with me that we should limit it to 5 minutes for each Senator?

Chairman Biden. Yes, I think on the first round at least we could set it at 5 minutes.

Chairman Pell. Very well.

Senator Biden.

Chairman Biden. I think it would be very useful, Mr. Ambassador, if you would include the deliberations to which you referred in the record. Without objection, I suggest they be made a part of the record.

[The information referred to appears in the appendix.]

Chairman Biden. General Allison, you said that you were placing in the record a letter signed by other negotiators.

By whom is that letter signed?

General Allison. The letter is signed by Gerard Smith, Royal Allison, Harold Brown, Philip J. Farley, Raymond Garthoff, J. Graham Parsons, John Rhinelander, and Lawrence Weiler. Each of these was either a principal delegate or held a responsible position on the delegation.

Chairman Biden. Who is it not signed by who was a principal participant?

Is there anyone who did not sign?

General **Allison**. Ambassador Paul Nitze has not subscribed to this statement.

Chairman **Biden**. That is understandable.

Gentlemen, during the Senate debate on the treaty, my colleague and once and potentially future chairman of the Judiciary Committee, Senator Thurmond, who, like Senator Pell was here at the time of the negotiations, made a statement, as follows, with which I assume you agree. But I would like to find out whether or not there is any disagreement.

Senator Thurmond said the following during the Senate floor debate in explaining why he had reservations about voting for such a treaty:

> It effectively prevents us from ever having the means to protect our population from a Soviet first strike. It also prevents us from developing new kinds of systems to protect our population. The most promising type appears to be the laser type, based entirely on new principles. Yet we forego forever the ability to protect our people.

Was that your understanding of what we were foregoing by signing this treaty?

General **Allison**. Are you addressing that question to me?

Chairman **Biden**. I am addressing it to both of you.

General **Allison**. I would be pleased to respond first, Senator.

We have not denied ourselves research toward laser systems. We have denied the United States a nationwide defense until such time as we reenter negotiations with the Soviets and the basis for our so doing would be that we see a possibility for improving the security of the world and we want to modify the ABM Treaty.

This is not to say that we would discard the ABM Treaty. But, under Agreed Interpretation D, we would reopen whatever issue it is that needs reopening in order to improve the security of our Nation.

Chairman **Biden**. "Reopen" means reopen and renegotiate, is that correct?

General **Allison**. Reopen and renegotiate those elements of the treaty which need reopening and renegotiating.

Chairman **Biden**. Thank you.

Mr. Ambassador.

Ambassador **Garthoff**. Yes. I agree with the general thrust of the statement, both as cited and as General Allison has expanded on it. To add an additional point in this connection, the treaty itself clearly does allow research. It also clearly establishes a ban, a prohibition, on the development and testing, as well as deployment, of space-based and other forms of deployment of an ABM system or components other than in a fixed land-based mode.

Agreed Interpretation D provides the possibility through the two provisions of the ABM Treaty for consultation and amendment to make provision for limited deployment of such fixed land-based laser or other systems based on other physical principles if the two parties agreed to do so.

As the treaty stands, it would permit development and testing of fixed land-based systems of this kind, and provides that supplementary negotiation and amendment would be required before there could be deployment of such a system.

It also bans the development and testing of such systems if they are space-based, air-based, sea-based, or mobile land-based.

Chairman **Biden**. I have many more questions, but my time has expired.

Senator Thurmond.

Senator **Thurmond**. Thank you, Mr. Chairman.

If we accept Dr. Henry Kissinger's assessment that the United States enter such negotiations to maintain peace and that the Soviets do so to increase their power, what does the United States accomplish by restricting itself to a narrow interpretation of the treaty?

I would like for each of you to answer that.

General **Allison**. As a negotiator of the treaty and one who testified before the Senate for its ratification, I think the issue is what did we agree to with the Soviets and what did we tell the Senate we agreed to. What was the interpretation then?

Dr. Garthoff and I have described our view of that this morning.

We believed then that the treaty was good for the security of the United States. I believe now it is good for the security of the United States, and, as the principal military officer involved in the negotiation, I set out to assure that we have the latitude to continue the research and research testing which will permit our military to develop new technologies.

We achieved that in the treaty, and we assured that we left to ourselves an avenue to reopen parts of the treaty should our research and testing lead us toward developments which would improve the security of our Nation.

Ambassador **Garthoff**. The statement which you cite from Dr. Kissinger is not the position that he held in 1972, or if it is, it is not the position that President Nixon accepted at that time.

There was no question then that the instructions to the delegation from the President, through the Secretary of State, gave us the mandate to seek and pursue a treaty that would embody the provisions on the subject that were, in fact, eventually negotiated.

The position held by the administration at that time, as indicated in such statements on the record as those to which I referred this morning, make clear that there was no question that at that time the administration held the interpretation which is now called the traditional or restrictive one.

I agree entirely with General Allison that this was and remains in the national security interest of the United States. If at any time the United States should decide that some other course with respect to ABM system development or deployment was required and was more in our interest than maintenance of the treaty, we could seek its amendment or withdraw from it. But we should not try unilaterally to redefine its content.

Senator **Thurmond**. It is my understanding that the negotiating record is ambiguous concerning whether or not a narrow or broad interpretation of the ABM Treaty is the correct interpretation.

Diplomatic negotiations are ambiguous by nature. This should be expected when a country whose legal traditions are based on English common law negotiates with a totalitarian dictatorship to achieve diametrically opposite ends.

I would like to ask each of the witnesses to assess for us what they perceive to be the objectives of each party in ABM Treaty negotiations.

General ALLISON. Our objective, the U.S. objective, was to start down a path to limit weaponry in the world so as to improve the security of the United States and the world generally.

I think we achieved that.

We have to have in mind, I think, in this hearing that we went to the negotiations with a view to limiting strategic arms. We are addressing here this morning one part of that. We are addressing the ABM Treaty.

Time and again in the negotiations we made the point that we must also limit strategic offensive arms.

As a military man, I remind you that there is an interrelationshp between offensive and defensive forces. To limit one element of that equation would be foolish.

We started down a road in the negotiations to limit both strategic offensive and defensive arms.

To repeat, Senator: Our objective was to improve the security of the United States. I believed then and I believe now that we did just that.

We had expected that those negotiations would be followed on promptly by further negotiations to further improve our security, by further limiting strategic offensive arms. Regrettably, that did not take place.

My answer to you, Senator, however, is our objective was to improve the security of the United States. We achieved that.

What the Soviet objective was, one can read a variety of opinions by people who have special interests. I would just prefer not to guess in this hearing as to what the Soviet objective is.

Senator THURMOND. General Allison, have you had occasion to be acquainted with or study the SDI Program?

General ALLISON. Senator, I keep abreast of developments like the SDI Program and all matters pertinent to the security of our country through the open press. Beyond that, I know nothing, of course.

Senator THURMOND. I guess you consider it a purely defensive weapon, as other people do, do you not?

General ALLISON. The reseach in the SDI Program may produce benefits applicable to offensive forces as well as defensive forces. I do not know. I am not privy to the classified information involved in the research program.

Chairman BIDEN. Senator Thurmond, I'm sorry but I think your time is up.

Senator THURMOND. The time is up?

Chairman BIDEN. Yes.

Senator THURMOND. Thank you.

Chairman PELL. Do you think or do you believe, both General Allison and Ambassador Garthoff, that the Soviet side accepted the American side's interpretation and that the Soviet view was correctly taken into account in the presentation to the United States Senate?

General.

General ALLISON. Yes.

Ambassador **Garthoff**. Yes, Senator. I believe that is clearly the case.

There is material in the negotiating record which makes clear that the Soviet negotiators understood the meaning of the provisions of the treaty involved in this question of interpretation in the same way that we did. This is probably not the occasion to go into the details of the negotiating record, but there were clear and explicit statements to that effect.

I would like, very briefly, also to reply, if I may, to Senator Thurmond's question.

I think it is incorrect to conclude that the Soviet and American objectives, in the case of the ABM Treaty or in many other cases, are necessarily diametrically opposed.

We are adversaries in many aspects of our relationship. There are well-known, sharp differences between the two systems.

But, in any negotiation, in order for agreement to be reached, there has to be some degree of congruent interests of the two sides.

The reasons for wishing to have particular constraints placed on ABM systems may or may not have differed between the two countries. What we are concerned with is the result.

An agreement has to reflect a decision on the part of both parties that the agreement is more in their interests than not having the agreement. It is clear that this was the case with the ABM Treaty.

In addition, while several questions have arisen about compliance with particular aspects of the ABM Treaty, questions that have been raised about certain actions of the Soviet Union, and of the United States, for that matter, none of these concerns activities involved in the area of question between the two interpretations that have been advanced.

As Ambassador Nitze has recently stated on the record, there is no evidence of any Soviet actions contrary to the restrictive interpretation of the ABM Treaty.

Finally, in any event, it is ultimately a question of the United States deciding whether something is in our security interest, including taking into account the Soviet understanding of the agreement and later Soviet performance under that agreement. It is on this basis that it was decided by the Government in 1972, supported by the overwhelming majority of the Senate, that the ABM Treaty was in the security interest of this country.

Chairman **Pell**. Going to the question of Agreed Interpretation D, which is very much a central piece in this whole discussion, what was its original purpose, in your view? Was there any disagreement about it?

I realize that in the basic treaty, as you pointed out, everybody but Ambassador Nitze signed on. But with Agreed Interpretation D, would that be the same situation?

General **Allison**. The purpose of Agreed Interpretation D was to assure that should the United States, through research, research testing, develop technologies which, if applied to weapons, would improve the security of the United States, we would have an avenue for renegotiating those elements of the treaty with the Soviets, discussing these developments and determining whether we then could reach further agreement.

Clearly, if we could not reach further agreement and we felt it was important to our security, we would give notice of our intent to withdraw from the treaty under the provision which required 6 months' notice.

Chairman PELL. Thank you very much. My time has expired. I think we should move on.

Ambassador GARTHOFF. Excuse me. May I also briefly respond to that, sir?

I am not, of course, deputed to speak on behalf of Ambassador Nitze or anyone else. But after conversations on this point with him in the recent past, I made the statement, already on the record, that at the time, in 1972, all of the negotiators accepted the judgment that the ABM Treaty embodied what is now called the restrictive interpretation.

It is also the case that I was the person who, in fact, negotiated with the Russians the language of Agreed Interpretation D, which stemmed from an American proposal and initiative, which, from the very outset, included the substance of what is found in article V(1) as well as Agreed Interpretation D.

We saw them from the beginning as compatible and complementary, rather than Interpretation D in any way diminishing article V.

Chairman PELL. Thank you very much, Ambassador Garthoff.

Chairman BIDEN. Senator Specter.

Senator SPECTER. Thank you very much, Mr. Chairman.

General Allison, in your statement, you say that the ABM Treaty permits research testing of ABM systems and components, including that based on new technologies, new physical principles, or so-called exotics.

Would you agree that the permissive testing would include, say, the development and testing of future systems, such as laser, long-wave infrared, and charged particles?

General ALLISON. Senator Specter, I believe, if I heard you correctly, you went from research then to development and testing.

There has developed in the vocabulary of these things a very sharp distinction. I would make an observation that a good many years ago, we, in the military, spoke of research and development as though it was one word. We were used to saying a weapon is in R&D.

Now, subsequently, however, we begin to break apart these items. Originally, I think for budgetary purposes, we developed the phrase "RDT&E," research, development, test, and engineering. Then, when we entered the negotiations with the Soviets, it became important to break it apart for a different reason.

So, when you went on to say "development and testing," you went beyond what the treaty permits.

The treaty permits research and research testing, and it does not limit the kinds of testing, the kinds of exotics that can be tested; but it limits them beyond research and research testing.

Senator SPECTER. General Allison, would your testimony be affected in any way if you were to find that the then-Chairman of the Joint Chiefs of Staff, Adm. Thomas H. Moorer, concluded at that time that under the ABM Treaty, it was possible to develop and test future systems, such as laser, long-wave infrared and charged particles?

General ALLISON. My testimony would not be affected, Senator.

I think it is possible that Admiral Moorer, in whatever discussion or testimony that statement appears, might have fallen into the use of language that I have just described.

I believe—I believe; I am not deputed to speak for him—but I believe Admiral Moorer had the same understanding of the treaty as I had in 1972, and I have seen nothing that would change that.

Senator SPECTER. Well, he would not have the same understanding that you have testified to if he had the conclusion that development and testing of systems like laser, long-wave infrared and charged particles were permitted by the ABM Treaty, would he?

General ALLISON. I think I have described the difference of language. That is the best I can do, Senator.

Chairman BIDEN. Excuse me, but would the Senator yield for a point of clarification?

Isn't there a distinction between that kind of testing, as it relates to land-based systems——

General ALLISON. Oh, yes.

Chairman BIDEN [continuing]. And that kind of testing as it relates to other systems?

General ALLISON. Yes.

Chairman BIDEN. Maybe that is what is confusing—well, not confusing—but maybe that is what is at issue.

Senator SPECTER. Well, that is not confusing me, Senator Biden. I am talking about space-based systems.

Chairman BIDEN. I didn't hear you say that.

Senator SPECTER. Did you work with Admiral Moorer, General Allison, at the time you represented the United States in these negotiations?

General ALLISON. Yes.

My duty assignment was Assistant to the Chairman, Joint Chiefs of Staff, for Strategic Arms Negotiations.

Admiral Moorer was the Chairman, Joint Chiefs of Staff, during about half of that period.

Senator SPECTER. So you reported to Admiral Moorer in his capacity as Chairman of the Joint Chiefs of Staff on these matters?

General ALLISON. In my military assignment.

But, as I stated in my prepared testimony, I was also appointed by President Nixon to be a delegate on the delegation.

Senator Specter. Picking up on the issue of the charged particle, General Allison, as an example of future systems, isn't it true that the charged particle technology known at the time, 1972, could not operate through the atmosphere and, therefore, could not have been considered except in a space-base for high atmosphere mode?

General ALLISON. That is a very technical point, Senator Specter, and I am going to pass.

Senator SPECTER. Well, this relates to the——

Chairman BIDEN. Senator, your time is up.

Senator SPECTER [continuing]. Issue which Senator Biden had raised.

Chairman BIDEN. Then I think you have plenty of time.

Senator SPECTER. I will pick it up on my next round. [Laughter.]

Thank you.

Chairman **Pell**. Senator Sarbanes.

Senator **Sarbanes**. Gentlemen, we are going to address in the next panel the interpretation of the ABM Treaty to the Senate when it was considered for ratification and the perception of it by Members of the Senate, including some who opposed it because they interpreted it to preclude certain things that they wished to see done.

Let me ask this question.

Within the administration, was there a debate over these provisions, a difference of opinion that centered around the proposition that the provisions did carry the restrictive interpretation and would therefore prohibited certain activities that some people wished to see done?

Did the same debate take place within the administration leading up to signing the ABM Treaty?

General **Allison**. In developing the treaty, we set out to protect our right to do research so that we were not denied the tremendous inventiveness toward new technology that we have demonstrated in the past in the United States and that we expect to continue to demonstrate.

When we protected that right in the treaty, it is my understanding that we satisfied most of those who were concerned that we not deny ourselves future capabilities.

Senator **Sarbanes**. Did those people who were concerned about not denying future capabilities understand, though, that we were being limited on the steps beyond research?

General **Allison**. Yes. I believe so. I think Dr. Garthoff a few moments ago made some observations along that line. He had some quotes, in fact.

Perhaps he would like to address the matter further.

Ambassador **Garthoff**. There was no disagreement at the time the treaty was concluded and presented to the Senate within the administration over its meaning, and at the time, for example, Senator Buckley, Senator Thurmond and others made statements on this subject, they were not challenged in that interpretation by any administration witness.

Senator **Sarbanes**. No, I am carrying it a step further. Accepting that there was no difference at the time the treaty was presented, was it an issue of difference prior to that time which was then resolved within the executive? In other words was, in fact, the very issue that is now being raised focused on within the executive at the time and resolved, with everyone in agreement with respect to a narrow interpretation?

Ambassador **Garthoff**. Yes.

There were differences and the matter was discussed and debated within the administration in the summer of 1971, and the President then concluded that deliberation within the executive branch and issued his instructions to the delegation. It was on the basis of those instructions which we then negotiated the provisions that are now being discussed.

After the time that decision was made and communicated to the delegation in August 1971, there were no divergencies within the administration over an understanding of what we were doing, or later of what we had done.

Senator **Sarbanes**. Is it your view that the Soviets also closed on the same interpretation of the treaty, the same view of it?

Ambassador **Garthoff**. Yes, sir. And I was so told by members of the Soviet delegation with whom I had been negotiating these questions in late January 1972, as we were working out the final wording.

Senator **Sarbanes**. Thank you, Mr. Chairman.

Chairman **Biden**. Senator Kassebaum indicated that she would prefer Senator Evans to go first even though she was here first.

Senator Evans.

Senator **Evans**. Thank you, Mr. Chairman.

I would like to ask each of the members of the panel whether they believe that perhaps we are begging the question. We are going to engage and we are in the middle of engaging in a long dissertation on the meaning of a treaty written 14 years ago, almost 15 years ago, and we can argue about how many angels dance on the head of a pin and spend a lot of time doing it. But is not the real question one that we should face up to today, and that is, What is in the best interest of the United States today? That best interest of the United States today may well be to continue the so-called narrow interpretation of the treaty. The best interest of the United States may be to have a broader view of the treaty, a reinterpretation, if you will. It may be to seek revision of the treaty through the processes which are set forth in the treaty. Or it may be to reject or abandon the treaty, to give a 6-month notice that we are getting out.

Is not really the fundamental question that we should be facing?

General **Allison**. That is a fundamental question. Whether it is the question to be faced by your committee I am not in a position to judge.

We have described, Dr. Garthoff and I, a view, which is that the two parties to the treaty understood at the time of negotiation what the treaty meant. We have described the view that the Senate of the United States understood what the treaty meant, the restrictive interpretation on that basis. They voted overwhelmingly, the Senate voted overwhelmingly to ratify, and the treaty was ratified.

To protect, to assure that we can protect the security interests of the United States, we, as negotiators, maintained a clear, open avenue for change in the future; that is, a combination of the articles of the treaty and Agreed Interpretation D.

I would suggest that if the United States, a great power in the world, sees that it is in its security interest and in the interest of security in the world to reopen issues in the treaty, and if those issues are not settled to its satisfaction, to declare its intent to terminate its association with the treaty, that can be done within the conditions that we negotiated.

But it would not do us credit to find a way around the treaty by reinterpretation unilaterally on some legal findings of words that appear in a record somewhere. I think we should do it frontally, not by skirting the issue.

Senator **Evans**. From what you know today, what would your recommendation be, given, essentially, the four alternatives I have mentioned? What, in your view, is in the security interest of the United States today: To maintain, for our practices here, the so-called narrow interpretation; the broader interpretation that the administration seeks; to attempt to go in and revise the treaty; or to reject or abandon the treaty? Maybe there is a fifth or other alternative, but what would you do today if you had the opportunity?

General **Allison**. Your third and fourth alternatives go hand-in-glove, I believe. If you wish to renegotiate or you feel that security interests require that something be done, you commence by opening discussions with the Soviets. If you and the Soviets cannot reach a meeting of the minds, then you have the option of abandoning the treaty after a 6-month notice.

Senator **Evans**. Well, then, let's collapse those two into one. Then you have three alternatives. Which one would you adopt?

General **Allison**. The security interests of the United States must be served.

I am not in a position to judge at the moment how far along we are in SDI, precisely what is required next, and whether what is required next indeed necessitates a reinterpretation of the treaty.

That is a decision that the Executive has to make, and if it is time for that, then discussions should be opened with the Soviets with a view to seeing if we can reach agreement.

Senator **Evans**. Mr. Garthoff, would you care to comment?

Ambassador **Garthoff**. Yes.

I believe that the restrictive interpretation is the only correct interpretation. As General Allison has said, if we should decide that it is in our security interests to effect a change in the provisions of the treaty, that is a matter that should be brought up for negotiation with the Soviet Union. If agreement cannot be reached, it is then up to us to decide whether it is more in our interests to continue to adhere to the treaty or whether we would then wish to exercise our right to withdraw from it.

Senator **Evans**. And you have no opinions?

Ambassador **Garthoff**. I have a very strong opinion that it is very much in our interest to remain with the treaty. I think it would be, in fact, in our interest to consider some possible discussion with the Soviets about tightening the treaty in some respects.

But whatever changes we might seek in terms of either loosening or tightening the existing treaty should only be addressed through consultation, negotiation, and amendment, and not through unilateral attempts to change something that is a contract between two parties.

Senator **Evans**. Thank you, Mr. Chairman.

Chairman **Biden**. Thank you.

I would say to my colleagues that we have a number of witnesses. I in no way want to deny anyone their right to question for 5 minutes. But you may very well be able to ask some of the questions to only one member as opposed to every one of the panelists. It is obviously up to you. Just for those of you who came in late, we have an extensive witness list and, fortunately, a very good attendance here. So you may decide you may want to focus some questions more appropriately on other panels—not that any question asked thus far has been inappropriate.

I say to my colleague from Washington, it is your turn. Senator Adams.

Senator **Adams**. Thank you, Mr. Chairman.

Gentlemen, in a prior existence, I was very much involved in the ABM debate in 1972, and, therefore, some of the questions that I ask to you will be based upon certain things that were occurring at that time.

First, I assume all of the negotiators were aware of a prior set of defensive systems against incoming missiles that had been tried and had been failing from the early 1950's. Is that correct? Can both of you just say yes or no?

Ambassador **Garthoff**. Yes.

General **Allison**. Yes.

Senator **Adams**. We had gone through Nike-Zeus and many others.

Second, my remembrance and understanding was that we had a dual rocket system—one space-based and the other the Sprint, which was to operate at about 25 miles. So there was an actual space component to the ABM systems that were being proposed at that time, maybe not laser, but it obviously operated at the height of the missile entry.

Isn't that correct?

General **Allison**. It was not a space-based system, Senator.

Senator **Adams**. No, no—not space-based, but land-based that operated in the space area.

General **Allison**. That's true.

Senator **Adams**. And, in article V, it was stated in the treaty that the parties agree not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based. Wasn't that correct?

Ambassador **Garthoff**. Yes.

General **Allison**. Yes.

Senator **Adams**. And did you not have instructions at the time in the negotiating process that you would have had to report back to Washington if you failed to reach an agreement to ban futuristic systems?

Ambassador **Garthoff**. Yes.

Senator **Adams**. And did you and the other negotiators not feel you had to report back that you had failed to obtain a ban on futuristic systems?

Ambassador **Garthoff**. To the contrary.

Senator **Adams**. To the contrary, you felt that you had, and that you had set forth in Settlement D a program for redoing that if it were necessary.

Ambassador **Garthoff**. We reported back what we were achieving, as we did it, including the fact that the net of complementary statements in articles I, II, III, V, and Agreed Interpretation D fulfilled our instructions to provide a ban on the development, testing, and deployment of space based, sea-based, and mobile land-based systems, and permitted the development and testing of fixed land-based systems, but not their deployment——

Senator **Adams**. Correct.

Ambassador GARTHOFF [continuing]. Based on future systems.

Senator ADAMS. And you had within the four corners of the treaty a clear system for either renegotiating under D, or withdrawing from the treaty if those conditions changed. Is that not correct?

Ambassador GARTHOFF. Yes.

General ALLISON. That's true.

Senator ADAMS. So, it is the testimony of both of you that this treaty is complete in its four corners on futuristic matters which would involve such things as SDI, and we would have to renegotiate and then come back to the Senate for advice and consent prior to ratification if there were to be a change and a creation in deployment or testing of futuristic systems?

Ambassador GARTHOFF. Yes.

General ALLISON. That's right.

Senator ADAMS. Both of you answer yes, then.

Ambassador GARTHOFF. Yes. It would be possible to develop fixed land-based futuristic systems, but not deploy. It is not possible even to develop and test space-based, sea-based, and mobile land-based.

Senator ADAMS. Correct. You could do certain things on the ground, but nothing was to be done in space.

Ambassador GARTHOFF. But no space-based components or systems were to be developed, tested, or deployed.

Senator ADAMS. Thank you, Mr. Chairman.

I agree, incidentally, with the statements of the two witnesses and I am very pleased they have made them.

Chairman BIDEN. Thank you.

Senator Kassebaum.

Senator KASSEBAUM. Thank you, Mr. Chairman.

Dr. Garthoff, earlier you said that the Soviet negotiators had very much the same position and there was a clear understanding on both sides.

Does either of you think that the Soviets have violated in any way the restrictive interpretation that was reached?

Ambassador GARTHOFF. No, I believe they have not.

General ALLISON. I agree with that.

Senator KASSEBAUM. Understanding that Krasnoyarsk is a conventional radar system and really is not a part of this particular debate, what is your assessment, however, of that radar in relation to the ABM Treaty constraints?

General ALLISON. It appears that it may be a violation. I say "it appears." I am speaking personally, of course. As you know, Senator, one has to have all the information if he is to make a sensible judgment. Having been in retirement now for 14 years and not having access to the information, I cannot make a firm judgment.

Ambassador GARTHOFF. In my judgment, the radar at Krasnoyarsk is intended primarily for early warning and, therefore, should have been placed only along the periphery of the Soviet Union and oriented outward. Therefore, it appears to be a violation of that provision.

However, while I think that is the fact, the Soviets have claimed that the radar is being constructed for space tracking purposes.

I do not think we are in a position to dismiss that totally, even if we are not convinced either that that is its only or its primary function.

So I think there is a question, a difficult question, of interpretation inasmuch as the treaty does not provide what is to be done in the case of a radar of dual function, one of which is constrained, the other of which, in this case space tracking, is not constrained.

So, I think there is a legal problem.

As far as the substance of it is concerned, the radar at Krasnoyarsk does not appear to be an ABM radar, but it does appear to be an early-warning radar, which should have been limited in its location by one of the corrollary provisions of the treaty.

Senator **Kassebaum**. Has either of you been involved between 1972 and 1985 in discussions about the ABM Treaty, and any desire particularly on the part of the administration to revise the interpretation?

General **Allison**. I have not.

Ambassador **Garthoff**. No. I have not been asked by the administration for any information or explanation of things involved in this matter.

Senator **Kassebaum**. Thank you, Mr. Chairman.

Chairman **Biden**. Thank you.

Senator Simon.

Senator **Simon**. Thank you, Mr. Chairman.

First, I want to commend the two witnesses. General Allison, you even look like a lieutenant general, even in that civilian garb.

Mr. Garthoff, you mentioned one thing that intrigues me. You said that you thought the treaty ought to be tightened.

Well, that is not the focus of this immediate testimony. I would be interested in just a 2-minute summary—and this will be my only question, Mr. Chairman.

Ambassador **Garthoff**. Senator, what I in particular had in mind is precisely the question that Senator Kassebaum has raised with respect to questions of compliance that have been raised with respect to several radars. In my own judgment, we should be working to resolve those differences and to provide a better basis for future actions in order to prevent new questions of compliance from arising.

Questions, not frivolous questions, have been raised about several American radars as well. The new large phased array radars at Thule, Greenland, and planned for Fylingdale Moors in England are also primarily early-warning radars. They are not located on the periphery of the national territory of the United States and oriented outward. The Soviets have charged them as a violation.

I am not prepared to say, again, because there are difficult legal questions in this case involving whether or not we had a right not merely to modernize some existing radars, which were grandfathered by the agreement, but to replace them with new radars—I think that is a questionable action. But my point is not to go into that in detail but simply to say that I think we should negotiate a resolution of the question with respect to the existing radars on the two sides, and seek a tightening of the provision so that in the future there would at least be obligatory consultation and, prefer-ably, agreement by the two sides before any large phased array radar were constructed.

The numbers involved are small—only several over a number of years. There is an interest, roughly comparable on both sides, in having a few new radars of this type. I think there would be a balance of interest as well as a better basis for decision in the future that would avoid these questions about compliance, both in actions by the Soviet Union and the United States.

Senator SIMON. Thank you.

General, do you wish to comment?

General ALLISON. Yes.

I am concerned when we start down a path of tightening because tightening generally means more detail, and shortly we find that the United States is trying to do the force planning in the Soviet Union and the Soviet Union is trying to do the force planning in the United States. There is a point beyond which we should not go in treaties.

We established the Standing Consultative Commission in this treaty to address matters, and I believe that some of the matters that Dr. Garthoff mentioned have been discussed in the Commission and, quite properly, should be.

I would add that when we negotiated the ABM Treaty, we crafted a document which is not long and complex. It is, I think, a reasonably elegant, brief statement which does what the two sides wanted done.

Length does not necessarily mean benefit. So I am not sure that the treaty needs tightening or renegotiation in that sense.

I firmly believe that if the United States considers that it is in its security interest to reopen this matter of what can be tested and developed, then it should reopen it through the avenues established in the treaty and renegotiate. And, if we are not satisfied, then render a judgment as to whether we will maintain the treaty.

Ambassador GARTHOFF. Mr. Chairman, may I add 30 seconds?

Chairman BIDEN. Surely.

Ambassador GARTHOFF. In the first place, I agree very much with the general point that General Allison has just made. In this instance, I think we may differ on the substance. But what I was suggesting was substituting a single sentence about future agreement to consult and agree before deploying radars, which could replace the somewhat more complex language of article VI(b) and Agreed Interpretation F, relating to large radars.

I also wanted to endorse General Allison's reference to the Standing Consultative Commission. The Standing Consultative Commission was very successful in dealing with and resolving to the mutual satisfaction a number of issues of compliance raised both by the United States and by the Soviet Union during the period from 1975, when the first such issues were raised, through 1979. It has been not very successful in the period from 1981 to the present. But it remains a potentially very useful and appropriate vehicle for dealing, among other things, precisely with this class of questions.

Senator SIMON. I thank both of you.

Thank you, Mr. Chairman.

Chairman BIDEN. Thank you.

Senator McConnell.

Senator McCONNELL. Bearing in mind your admonition, Mr. Chairman, I will have just one question.

Has this administration, the Reagan administration, done anything or changed its policy in such a way that would constitute a violation of the ABM Treaty in your opinion?

General ALLISON. I know of nothing that they have done yet. They have discussed doing things. But specifically, no, I do not know of anything that has violated the treaty.

Ambassador GARTHOFF. As I have mentioned, I believe that the construction of a new large phased array radar in Thule, Greenland, a decision which was made and construction of which has occurred during the period of this administration, may be a violation of the treaty.

The principal question that arises is with respect to the whole purpose and declared intent of the SDI Program, in the first instance, and the attempted reinterpretation of the treaty in the second.

I am not a lawyer and would not on my own authority try to decide the question. But at the least, I think it can be said that the declared intention not only to develop but also to deploy a nationwide defense would, under American law, be at least an actionable issue with respect to anticipatory breach of contract.

More important, in a sense, I think that if the Soviet Union, rather than the United States, let's say if a few years ago the Soviet Union had announced unilaterally a new interpretation of the kind announced in this country in 1985, there is no question in my mind that the United States would have charged that this was not consistent with the ABM Treaty.

Senator McCONNELL. That is all I have.

Chairman BIDEN. Thank you very much.

Gentlemen, thank you for your testimony. It seems to me that it reinforces the record. Obviously I have a point of view, but I don't know how we could possibly have negotiated a treaty that was expressly designed to prohibit full-scale population defenses and then suddenly say the reason we need a "broad" interpretation is to allow a system to be put into place which the President expressly states is designed to protect the entire population.

I find that somewhat inconsistent.

At any rate, I thank you both for your testimony. It has been very helpful. I would ask you if you would be willing to respond to questions in writing if any of my colleagues who have not been able to make it here would have any. We will keep the record open to that effect.

Ambassador GARTHOFF. Certainly.

General ALLISON. I would, of course.

Senator SPECTER. Mr. Chairman, are we going to have only one round of 5 mintues?

Chairman BIDEN. Well, we have a lot of witnesses. If it is critical, the Senator can continue for a few more minutes. But you will have a crack at a bunch of other witnesses who also were there. But if you would like, go ahead.

Senator SPECTER. Thank you, Mr. Chairman.

I will submit some followup questions to you, General Allison, in writing to pursue the issues which I had raised.

Ambassador Garthoff, have you had any occasion to review the negotiating record subsequent to 1972?

Ambassador **Garthoff**. Yes.

Senator **Specter**. When did you do that?

Ambassador **Garthoff**. I have restudied a number of aspects of the negotiating record, particularly in the period around the end of the 1970's—the beginning of the 1980's. I do not have access to or an opportunity to review the entire negotiating record at this time.

Senator **Specter**. Have you sought an opportunity to review it?

Ambassador **Garthoff**. I have not been asked by the administration.

Senator **Specter**. No, my question to you is have you sought an opportunity to review the negotiating record yourself?

Ambassador **Garthoff**. No.

Senator **Specter**. There are some of us who are reviewing this issue as to public disclosure of the negotiating record because it is very difficult to conduct these hearings and to get to the facts which were in existence in 1971 and 1972 under what is obviously restrictive as to what we may ask you about. And there are compelling public policy considerations not to disclose the record. But they may be overweighed in this situation.

I, for one, am reviewing that now with a view to perhaps making a request to the President that the record be made available.

But there are a series of airgrams, Ambassador Garthoff, where you were the key figure on these negotiations, and on some of them there is a suggestion that I would like to pursue with you. Perhaps we may do it privately or perhaps we may do it in closed session.

At one time, did not article V contain at your suggestion the provisions which later were inserted in Agreed Interpretation D?

Ambassador **Garthoff**. At one time article V included the provision which was later made Agreed Interpretation D, that is correct. It was not put into article V at my instance. This was part of our initial delegation drafting of treaty language, based on the instructions that we had from Washington.

But the point is correct that it was at one point part of the language as a subparagraph in what became article V.

Senator **Specter**. And wasn't it removed from article V because the Soviets were unwilling to deal with the issue of future limitations on space-based antiballistic missile systems as part of the limitations?

Ambassador **Garthoff**. No, sir.

By the time that we removed that provision from article V and proposed an agreed interpretative statement, the Soviet delegation had explicitly accepted the idea that article V(1), with the language which is now there in the treaty, included not only current technologies but also future technologies based on other physical principles.

So, by that time they had, in September, accepted the ban on development, testing, and deployment of space-based, air-based, sea-based, and mobile land-based systems, and components based on future as well as current technologies.

Senator SPECTER. Well, if that is so, why was it not left in article V instead of being removed to Agreed Interpretation D?

Isn't it a fact that Minister Seminov refused to go along with your thinking on it and the instructions that you had and that is the reason that it was taken out of article V and moved to an unusual position, in Agreed Interpretation D?

Ambassador GARTHOFF. No.

Our initial proposal to the Soviets, before they had reacted or commented on this issue in any way, included an article—it was initially article VI, it became article V—which had three parts to it. One of those parts had to do with space-based, et cetera, and included the question of development and testing, as well as deployment of space-based, sea-based, et cetera, systems, which became article V(1). It also included another provision, as I have mentioned in general terms, complementing that, rather than subtracting from it, which addressed the particular issue of deployment of systems, including devices based on other physical principles, which became statement D.

So, from the outset, we had in mind those two complementary provisions.

It is correct that the Soviet delegation argued for a long period that it was superfluous, not necessary, and that they did not wish to have a provision along the lines of what became Agreed Interpretation D. We were the ones to advance the idea of making it an agreed interpretive statement, rather than a subparagraph of an article in late December. I advanced that idea to the Soviet delegation on the basis of guidance and instructions from the delegation. And they agreed on that idea.

That was not the end of the issue. We still were discussing the question of the content of such a statement, and that was not resolved until the beginning of February 1972.

But, as I have mentioned, as we were working on the final language of that Agreed Interpretation D, after having reached agreement on article V(1) and after having gone back and changed the language of article II, to insert the word "currently" so that that article covered future as well as current components——

Senator SPECTER. Mr. Chairman, I understand the constraints of the committee's work, so I shall not pursue the matter now. We will have to figure out a way to do it.

But I would just suggest that it would be useful if we pursued this with your having an opportunity to review the documents which you prepared contemporaneously in 1971 and 1972, because I would suggest that there are some variances which it would be useful and in the public interest to have us analyze together to try to figure out exactly what these matters were.

They are very involved and it cannot be pursued in just the course of the few minutes which we have available here today.

I thank the Chair.

Ambassador GARTHOFF. Senator, I would be happy to pursue this further with you in a committee or alone, and on the basis of my recollection and knowledge of the record or on the basis, if that is provided for me, to refresh my memory by reference to the documents.

Senator **Specter**. Well, I think you should have access to the documents.

Ambassador **Garthoff**. I think that would be the most expeditious way for the administration to have handled this all along.

Senator **Specter**. It is just not right to ask a man in 1987 to talk about these matters from 1971 and 1972, when there are documents which are available, which can lend clarity to these very important and complex issues.

Chairman **Biden**. I share the Senator's view and thank him for his consideration and, along with the chairman of the Foreign Relations Committee, will attempt to accommodate that because I think you are right, it would be important.

I thank you gentlemen both for your testimony. It was lucid and extremely helpful. The committee may ask you to come back at another time, if you would be willing. But we will move on from this point.

General **Allison**. Thank you, Mr. Chairman.

Ambassador **Garthoff**. I was happy to be here.

Chairman **Biden**. As our next witness, we are privileged to have a very special guest. He sat here as chairman of the Foreign Relations Committee longer than anyone else in the 170-year history of this committee. He elevated the stature of the Senate and the committee throughout his career of courage, wisdom, and integrity, which has been the inspiration for many of us. His many writings, I almost regret to say, retain an unfortunate timeliness for all of us here today. I think we would all benefit from rereading "Old Myths and New Realities," and "The Arrogance of Power."

Mr. Chairman, it is a tremendous honor to welcome you back. Senator Fulbright, would you please come forward to give us your testimony.

Also, I understand that Senator Wilson is here.

Mr. Chairman, as I understand it, you are willing to share the platform with Senator Wilson, so maybe we could ask Senator Wilson to come forward also at this time.

Mr. Chairman, welcome back. Little did I ever think when I first met you, when I was elected in 1972, that I would be sitting here, as chairman of a committee, hearing testimony from you. It is a great honor and a privilege. I am delighted that you are here and look forward to hearing what you have to say.

STATEMENT OF HON. J.W. FULBRIGHT, FORMER CHAIRMAN OF THE SENATE COMMITTEE ON FOREIGN RELATIONS

Mr. **Fulbright**. Thank you, Mr. Chairman.

It is a great compliment to be invited after all these years. It has been, what has it been, 12 or 13 years since I have been in here, and it is about 40-odd years since I first came into your position.

Chairman **Biden**. You do not look any different, Mr. Chairman, than when I arrived here.

Mr. **Fulbright**. Well, I can assure you that it is quite different, however it may look.

I am very honored to be invited, and, for whatever it is worth, my point of view is not from the negotiating position, but from what was presented to the Senate, as I was, as you have said, the chairman of the committee at that time and managed the treaty on the floor.

I have a short—though not as short as it ought to be—a written statement, Mr. Chairman.

Chairman BIDEN. Please take as much time as you need.

And, before you begin, Mr. Chairman, let me indicate to the remaining witnesses that after this panel is finished, we will recess until 2 o'clock, at which time our constitutional experts, Senator Nunn and others will be invited to testify.

Mr. Chairman, without any further interruption, please proceed.

Mr. FULBRIGHT. Thank you, Mr. Chairman.

When the ABM Treaty was debated and overwhelmingly approved by the Senate in 1972, neither its proponents nor opponents, nor those who had reservations but in the end voted for it supposed that the treaty contemplated or would permit the development and testing of antiballistic weapons in space.

The radical reinterpretation of the treaty proposed by the Reagan administration, so as to sanction its strategic defense initiative, runs directly counter to the plain language of the treaty, to the intent of the Nixon administration, as it was explained to us at the time, and to the clear understanding of the Senate, as documented by the hearings and floor debate, culminating in the approval of the treaty on August 3, 1972, by a vote of 88 to 2.

Accordingly, I endorse the resolution before the committee as a careful, factual, and precisely stated and—under the circumstances—urgently needed reaffirmation of the meaning and intent of the ABM Treaty and of the Senate's understanding of that treaty in giving its advice and consent to ratification.

Speaking for myself, I state categorically that, had I suspected that the ABM Treaty would validly be interpreted as to allow Star Wars or anything resembling it, I would either have opposed the treaty or proposed a clarifying reservation or interpretation. I certainly would not have guided it through the Foreign Relations Committee and sponsored it as a floor manager.

I yield to the learned lawyers in giving precise and detailed interpretation to the specific provisions of the ABM Treaty, to the protocol of 1974, and to the Agreed Statements of Interpretation that accompanied the original treaty.

I affirm only—but emphatically—that, taken together, these instruments can leave no reasonable doubt that the basic purpose of the ABM Treaty was to prevent the parties from ever acquiring the capacity to build nationwide defense systems against strategic ballistic missiles.

The intent of the treaty was to base the security of both superpowers on mutual deterrence, which is to say, on the certainty of retaliation if either were to launch an attack. It was hoped, too, at the time that the certainty of retaliation would eliminate or greatly reduce the need of costly and redundant offensive systems.

No one at that time, to my recollection, contemplated that systems based on technologies not then in existence would be exempt from the treaty's ban, under article V, on development and testing as well as deployment of antimissile systems.

It was indeed precisely because of this prohibition that two Senators voted against the treaty and others expressed personal reservations.

Senator Buckley of New York, for example, said that he would vote against the treaty because under it we would be, and I quote, "denying ourselves for all time—or denying the Russians, for that matter—the right to protect our civilian populations from nuclear devastation."

Senator Buckley said that he was an opponent of security based on mutually assured destruction and, "the ABM Treaty does, in fact, serve to permanently institutionalize this posture."

Senator Allen of Alabama, the only other Senator to vote against the treaty, based his opposition on similar grounds, referring specifically to the possibility of future defensive systems. He said, and I quote, "There is reason to believe that the United States has the scientific and technological cabability of providing adequate defense against nuclear attack, and I consider it immoral and an invitation to nuclear blackmail not to develop defense against nuclear attack." That appears in the Congressional Record on August 3, 1972.

Senator Thurmond, of South Carolina, supported the treaty, but cited what he considered its drawbacks, including the exclusion of systems based on new technologies. As Senator Thurmond put it, the treaty

> Effectively prevents us from ever having the means to protect our population from a Soviet first strike. * * * It also prevents us from developing new kinds of systems to protect our population. The most promising type appears to be the laser type, based on entirely new principles. Yet, we forego forever the ability to protect our people.

That is in the debate of the Senate on August 3, 1972.

Whatever one may think of the merits of these objections, no one contested the interpretation of the ABM Treaty on which they were based. Quite the contrary, supporters of the treaty understood it to represent an explicit, unqualified commitment to the strategic principle of security based on mutual deterrence, and to the broader political principle of peaceful coexistence.

Senator Muskie, of Maine, said in debate, and I quote, "The significance of this treaty is that both sides have recognized that they will remain vulnerable to retaliation in a nuclear exchange, and this, in turn, greatly diminished the prospect that either side might ever seriously consider launching nuclear war. The limit on ABM's provides the foundation for nuclear stability." That is in the Congressional Record.

Senator Bellmon, of Oklahoma, objected to even the ABM sites allowed under the treaty for the protection of Moscow and Washington, because, as he put it,

> Such an arrangement removes one of the greatest deterrents to war which the world has ever known; namely the certain knowledge in the minds of governmental leaders that if they blunder or deliberately lead their nations into a nuclear war, they can expect to immediately and personally suffer for their stupidity.

Senator McIntyre of New Hampshire—to cite one final example—asserted that the meaning of the ABM Treaty was that

> Both sides finally recognize that no amount of money, no stroke of technological genius, no total application of national resources could ever assure either side of the capability to destroy the other without in turn being destroyed itself.

Mr. Chairman, I have no wish to take up the time of the committee with an exhaustive recounting of the debate of August 1972. I cite those proceedings to illustrate my conviction that, in approving the ABM Treaty in 1972, the Senate clearly understood the prohibitions against defensive systems spelled out in article V of the treaty to be definitive and permanent, qualified only by the provision of article III, allowing each side the option to build two ABM sites.

The Executive, no less than the Senate, understood the treaty in these terms. Neither the President, the Secretary of State, nor any of the President's arms control advisors suggested that the treaty would permit of development, testing, and deployment of antiballistic missiles in space, or under any technology not then existing.

The treaty was understood to represent a commitment, a permanent commitment to security based on the strategic principle of mutual deterrence. Henry Kissinger in his memoirs comments as follows on the significance of the ABM Treaty, and I quote:

> There was a revolutionary element in the first strategic arms limitation treaty [SALT I]. * * * For the first time in history, two major powers deliberately rested their security on each other's vulnerability.

That is in his book "Years of Upheaval."

President Nixon, in his memoirs, is even more explicit in his understanding of the ABM agreement as a permanent commitment. He writes:

> The ABM Treaty stopped what inevitably would have become a defensive arms race, with untold billions of dollars being spent on each side for more and more ABM coverage. The other major effect of the ABM Treaty was to make permanent the concept of deterrence through mutual terror: by giving up missile defenses, each side was leaving its population and territory hostage to a strategic missile attack. Each side therefore had an ultimate interest in preventing a war that could only be mutually destructive.

Whatever Mr. Nixon and Mr. Kissinger may think about SDI today, there is no reason to doubt that at the time of the signing of the ABM Treaty, they regarded the commitment to mutual deterrence as "permanent. "That is the word used by President Nixon—not as temporary, provisional, or subject to abandonment upon the arrival of some exotic new technology.

The ABM Treaty may also be understood in terms of the larger political commitment to peaceful coexistence—the inevitable corollary to the strategic principle of mutual deterrence. That was my understanding of it at the time, and I cannot doubt that that was also the view of the administration and the Senate in that year in which East-West agreements were reached not only on SALT, but on trade, on the status of Berlin and its access routes, and on cooperation in such fields as public health, pollution control, science, and technology band space exploration. All of these were joint ventures, in a sense, and I think extremely useful and constructive.

I recorded my understanding of the ABM Treaty and the other agreements reached in 1972 in a book published in 1972, called "The Crippled Giant." I quote:

> The agreement reached at Moscow on May 1972, limiting ABM sites and the deployment of offensive weapons was more important as an act of mutual commitment to coexistence than for the actual arms limitations it imposed. Indeed, giving up the ABM—except for each side retaining the option to two sites—is probably the single most significant commitment the two super powers have made to the principle of coexistence. Insofar as each side abandons the effort to make itself invulnerable to attack or retaliation by the other, it also commits itself to peace and to the survival of the other's power and ideology. The Russians, in effect, abandon the Marxian dream of a world communized by war; we, in turn, lay to rest the last vestiges of the old idea of a global crusade for freedom. These are the symbolic implications if not the immediate fact of the Moscow agreements.

Mr. Chairman, because we are concerned today with questions of legal interpretation rather than of policy, I forebear to comment on the extravagant unwisdom of Star Wars. I note only that I know of no instance in human history in which mechanical means alone, no matter how ingenious, have kept the peace for long between hostile great powers. What one has invented, the other sooner or later—and usually sooner—will also invent or overcome.

Peace, when it has lasted, has been based on the shared will to maintain peace, if not always because peace was recognized as mutually beneficial, then at least because war was recognized as mutually catastrophic.

I agree with Prof. Thomas C. Schelling of Harvard that, in matters ranging from getting safely across a busy street to the prevention of nuclear war, "most of what we call civilization depends on reciprocal vulnerability," and that "a prudent restraint from aggressive violence that is based on acknowledgement that the world is too small to support a nuclear war is a healthier basis for peace than unilateral efforts to build defenses."

To return to the matter at hand, the resolution before the committee states that unassailable principle—in section 1(a)(2), that the meaning of a treaty is informed by the interpretations spelled out in its legislative history as well as by all relevant Executive communications. This is an exceedingly important principle, Mr. Chairman. It means simply and fundamentally that a law means what its framers intended it to mean and not what a later generation of policymakers would like it to mean, especially when, as in the present case, the revisionists, through sophistry and tortured logic, attach to the law a meaning diametrically opposed to the intent of its framers.

The administration has the right, under the ABM Treaty, to propose amendments or to withdraw from the treaty. It does not have the right to perform radical surgery by tortured reinterpretation.

The resolution before the committee aims to prevent that and, in so doing, to defend the constitutional role of the Senate in the making of treaties. Accordingly, this resolution should be supported by all Senators, regardless of their individual positions on the SDI.

Mr. Chairman, that finishes my prepared statement.

I would like unanimous consent to insert a letter and a document here, if the committee would allow me. The letter is signed by a number of Senators who were in the Senate at the time.

Chairman Biden. Without objection, it will be entered.

[The information referred to appears in the appendix.]

Chairman **Biden**. Out of curiosity, I would like to know the names of the signators.

Mr. **Fulbright**. Do you want me to read you the names?

Chairman **Biden**. Yes, just the names of the Senators.

Mr. **Fulbright**. This letter is addressed to Mr. Ronald Reagan. The names, the two principal ones, are Senators Pearson and Edmund Muskie. The further ones who signed it are Birch Bayh, Edward Brooke, Howard Cannon, me, Fred Harris, Harold Hughes, Warren Magnuson, Gale McGee, George McGovern, Thomas McIntyre, Walter Mondale, Frank Moss, Gaylord Nelson, John Pastore, Abraham Ribicoff, William Spong, Adlai Stevenson III, Stuart Symington, and John V. Tunney.

Chairman **Biden**. Thank you very much.

Senator Wilson.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM CALIFORNIA

Senator **Wilson**. Thank you very much, Mr. Chairman.

Mr. Chairman, gentlemen, and Senator Kassebaum, I am grateful for the opportunity to appear before you this morning.

Unlike our distinguished former colleague, I think with the possible exception of Senator Pell, none of us were present at the time of the debate to which he has made reference this morning. I certainly was not. I have been present, however, in room S–407.

My purpose in appearing before you this morning at this hearing is to appeal to you most urgently to join in my plea to the President that he authorize immediately the declassification of the official record of negotiation of the Anti-Ballistic Missile Treaty of 1972.

Unless the official negotiating record is made public, the American people and, indeed, the U.S. Congress, have no assurance that they will ever learn the truth as to the actual obligations mutually agreed to in 1972 by the United States and the Soviet Union with respect to development, testing, and deployment of ABM systems and their components based upon principles, physical principles and technologies, other than those consisting of fixed land-based launchers, interceptor missiles, and radars.

Having studied the record, it is clear that, despite repeated strong efforts by the American negotiators to ban such future systems and components, they never succeeded in getting Soviet agreement to a ban on development and testing, and achieved only the limited success of getting the Soviets to agree that prior to deployment, consultation, in accordance with article XIII and discussion, in accordance with article XIV must occur.

It may even be argued, and at one point was argued by Soviet negotiators, that agreement is not required to permit deployment.

The evidence is clear and overwhelming that the Soviets succeeded by their persistent rejection of the American position in limiting the far more stringent restrictions of the treaty articles to fixed land-based ABM systems and components and agreed that only the much less restrictive positions of a minute to the treaty, so-called Agreed Interpretation D, should apply to so-called future systems, that is, those based on other physical principles.

Yet, notwithstanding the great preponderance of clear evidence favoring the broad interpretation, which is contained in the negotiating record, the treaty it defines has been presented to the American people and to the world at large as binding the United States to abide not by the obligations actually agreed to, as set forth in the secret record of negotiation, but, instead, by the far more restrictive obligations which the American negotiators sought unsuccessfully to impose and which the Soviets rejected.

This revision of history has led understandably to the widest possible and most serious misapprehension as to the truth regarding our obligations under the ABM Treaty and has produced an entirely unnecessary debate as to whether a broad or a narrow interpretation of treaty provisions is the correct one.

The broad interpretation is, of course, the correct one because it is what was actually agreed, as is clear from the negotiating record.

The narrow interpretation is what the U.S. negotiators tried to get, but failed to get, from the Soviets. Yet, it has been represented to the Nixon administration and to the Senate that the U.S. negotiators did, in fact, achieve Soviet agreement to the narrow language they were instructed to obtain.

They did not.

It is, of course, the actual agreement which was negotiated which sets the rights and duties of the United States and the Soviet Union. No extrinsic evidence, no external document, apart from a subsequent formal treaty, can amend the agreement so as to alter the rights and duties of the parties.

And, it is, of course, the negotiating record which defines the agreement insofar as terms and obligations are not clear from the text itself.

No further extrinsic evidence of the negotiation or of the negotiating record can be looked to legally or logically as better evidence of the agreement or of the record than the record itself, unless ambiguity, mistake, or fraud is asserted to exist in the record.

State Department Legal Advisor, Judge Abraham D. Sofaer, and Ambassador Paul Nitze, have now undertaken to perform an exhaustive analysis of the record of ratification.

Fine, Mr. Chairman. Let them perform such an analysis. I have no doubt that their work will be thorough and complete and that, where the negotiating record is ambiguous, it can be helpful in resolving such ambiguity.

But, Mr. Chairman, where the negotiating record is clear and unambiguous, I seriously question whether analysis of the ratification record can have value, precisely because it is unnecessary. The logic of the best evidence rule would seem to apply with as much force to the construction of this contract between nations as to the construction of a contract between private parties.

Where the text of the treaty discloses ambiguity on its face, as does the text of the ABM Treaty, resort to extrinsic evidence, in this case the treaty negotiating record, is fully justified to explain such ambiguity. And if the negotiating record itself discloses ambiguity, further resort to extrinsic evidence is warranted there.

But where the negotiating record is clear and unambiguous, it is the best evidence of the agreement, and further extrinsic evidence in conflict with the record—I stress in conflict with the record—must be viewed as suspect, including even statements of participants in or observers of the negotiation, which are in conflict with the clear and unambiguous record.

Here I have in mind subsequent comments that have been made; for example, one that has been cited by our colleague, Senator Levin, who received from Mr. Garthoff a letter in which he, Mr. Garthoff, claimed that he had obtained a clear concession from the Soviets that article II of the treaty includes, as components, any device capable of performing the function of components. But to the contrary, Mr. Chairman, the record discloses in a very detailed discussion a very different story.

Chairman **Biden**. May I interrupt the Senator there?

This is a classified record. How can you be selectively declassifying it now? Don't you think we should keep it classified?

This selective declassification, unless I am missing something here, seems to me to be something that puts us all into a difficult position.

Senator **Wilson**. Mr. Chairman, I think that the best thing that could come from this hearing would be a resolution urging the President to declassify the negotiating record.

Chairman **Biden**. I fully support your position. I think we all do.

But I think we are skating on very thin ice here as we selectively declassify the record, because that puts us all into a difficult position. I am familiar with parts of the record, not all of the record. I don't want to be in a position, nor do any of us, of rebutting an assertion that is classified by further classified information.

I just would suggest that as you refer to the classified elements of the record, you explicitly avoid that so that we do not find ourselves in the position of "if you knew what I knew then you'd know that I know that you're right, or you knew that I knew you were wrong"—that whole thing.

Senator **Wilson**. And yet, Mr. Chairman, that is precisely what is going on, because the record is classified.

Your question and your point I think make abundantly the point of the irony of, frankly, the conduct of a public hearing on a matter the secret classification of which is inhibiting public inquiry.

Chairman **Biden**. If the Senator would note, we did not speak to any of the classified documents prior to your testimony. The Senator is making a point. I happen to disagree. He argues that the controlling documents should be the classified record. I would argue that the controlling documents should be what was transmitted to the Senate and only what was transmitted to the Senate and the clear understanding of those who voted on the document.

But that is a matter for debate, which I think we are engaging in now, and I would invite you to put your oar in on it, which you have been. I just would suggest that we all stay from a discussion of the classified record until it is declassified.

Chairman **Pell**. I would like to step in here and concur with what the chairman of the Judiciary Committee has said, and also point out if we do declassify—and there are many arguments to do so—we had a negotiating partner, the Soviet Union, and I am not sure that we would want them, in turn, declassifying all of the conversations that led up to a treaty or agreements that we have had in the past with the Soviets.

Senator WILSON. Chairman Pell, I would think, in the circumstance, that whatever might prove embarrassing to anybody is a much lesser consideration than a clear understanding of the actual obligations that were assumed.

And, in fact, Mr. Chairman, since you have brought up the point—and I think it is a valid point, one that underscores the need for making public the entire negotiating record—let me commend my colleague, Senator Specter, for his line of questioning to witness Garthoff this morning, because he was pursuing exactly the point that I was seeking to make with my reference.

It is essential that that record be made public. Otherwise, we have a situation that really is untenable. But I will abide by the chairman's stricture, and I will simply make the comment that I disagree emphatically with the point that we can ignore the negotiating record. It is the negotiating record that indeed frames the obligations because it says what was agreed to, not what it was represented to be, and, frankly, the representations I will tell you at least are in conflict with that record.

Chairman BIDEN. I thank my colleague.

Senator WILSON. Now, to simply make that point further, where the negotiating record is clear and unambiguous, it is the best evidence of the agreement and further extrinsic evidence in conflict with the record must be viewed as suspect. It requires, at the very least, explanation, I say even including statements of participants in or observers of that negotiation, if they conflict with a clear and unambiguous record.

In the same way, the ratification record cannot serve as a competent basis for altering the clear meaning of the negotiating record. It cannot add new duties for the parties to perform when the negotiating record makes clear that one of the parties expressly rejected them, as did the Soviets repeatedly in refusing to agree to the U.S.-proposed ban on future ABM technologies.

And, as the Soviets refused in 1972 to be bound by the narrow interpretation of the treaty, neither is the United States so bound today.

All of this would seem as clear as the best evidence rule as a matter of law. But, because the truth is locked away from public view, in secrecy imposed by national security classification, neither the American people, nor our allies, nor the news media, nor even the Congress, except for the few Members who have troubled to read the record, have access to the truth as a practical matter.

There is, as Chairman Biden's question has pointed out, a real irony to conducting a public hearing in which, inescapably, you are led by logic to consider a record of negotiation which is secret and whose secrecy inescapably inhibits needed public inquiry.

What better example could we require, Mr. Chairman, to illustrate the need for declassification of the negotiating record than this very unsettling circumstance presented before and during this hearing of representations publicly made explaining the treaty or the record which are, in fact, contradicted by the secret negotiating record.

That is the point of Senator Specter's inquiry.

Whatever the good intentions and honest convictions of those whose public representations of the negotiation are at variance of the record of negotiation, the American people, the news media who inform them, are allies, and even overscheduled Senators, too busy to avail themselves of their access to secret documents, are all at least entitled to know that a discrepancy exists between such public statements and the secret record.

Mr. Chairman, we are busy. I condemn no one. The fact of the matter is the log in S–407 carries five names of Senators.

Now, as long as the negotiating record remains shrouded in secrecy, the public cannot learn that such a discrepancy exists. They can only be told, as you pointed out, Mr. Chairman, only told conclusions about what the record really reveals by those privileged few who have access to it. They are placed in the position of the juror in a personal injury suit who is compelled to decide, somehow, which of two flatly contradictory and conflicting medical expert witnesses he or she is to believe.

It is simply not fair to the American people.

Declassification of the negotiating record in this instance threatens in no way to compromise either human intelligence sources or means and methods of gaining intelligence.

But continued secrecy does threaten continued public and congressional misunderstanding and it allows the Soviets to continue a revisionism by which they now assert a position exactly contrary to that which the negotiating record makes clear is the true Soviet position at the time of signing the ABM Treaty: one of steadfast rejection of a ban on development, testing, and even deployment of future ABM technologies.

Our future ability to defend the American people against the possible horror of nuclear ICBM attack depends upon lifting the artificial constraint upon our technological ABM capability that would be imposed by continued adherence to the narrow interpretation.

Our national security interest is of paramount importance. It greatly outweighs whatever considerations might be argued against declassification.

Let me finally say a word about the concern that say may voice, indeed have voiced already, with regard to breaking confidentiality of the negotiating process and risking the undermining of trust.

Trust has been undermined, not only by a clear Soviet violation of the undisputed provisions of article I, but by Soviet assertions that the United States, in our espousal of the broad interpretation, is lying about the agreement negotiated in 1972.

Mr. Chairman, we are not only entitled, we are obliged to make public the secret negotiating record so the world can learn the truth.

Mr. Chairman, I am grateful for the opportunity. I urge you to communicate to the President, either individually or, better yet, by a resolution of the Foreign Relations Committee and one of the Judiciary Committee that it is imperative that the President revoke the classification of the negotiating record at once.

Chairman Biden. I thank my colleague for his statement. I just have two brief questions and then I will yield to my colleagues.

First, I ask the Senator if, in his capacity as a U.S. Senator from California, a treaty were brought forward on another matter in which the administration set forward in detail what it in fact intended by the treaty and, based on those assertions, he voted for or against the treaty, and was later told by the administration that that is not really what they had told the Soviets, would he feel that his vote for the treaty was, in fact, one that was in any way meaningful?

How can you possibly vote for a treaty in which everything you were told simply was not so?

Senator WILSON. Mr. Chairman, I would feel that I had been misled, and I would feel also that, notwithstanding my beliefs at the time that I cast that vote, that would not in any way alter the negotiation, and it is the negotiation which would frame the obligations, the rights and duties of the parties. A misapprehension on my part would not alter the duties of the Soviet Union nor would they or should they alter those of the United States.

Chairman BIDEN. Well, I do not want to debate with you now. We obviously will have plenty of time on the floor. But it seems to me that you have just rendered null and void the advise and consent provision of the U.S. Constitution.

Senator WILSON. No, I don't think so at all, Mr. Chairman.

Chairman BIDEN. Oh, I understand that you do not, but I do.

Senator WILSON. Well, let me respond since you have raised the point.

I think that where there is a conflict between a negotiating record, as there is in this case, and subsequent presentations, there is a need for the public to enjoy some clarification of that, a need for the Senators to enjoy it, and the public who we serve is entitled to that.

Chairman BIDEN. If I may interrupt, that is not the conflict.

The conflict is whether or not the negotiating record to which you refer is inconsistent with what the Senators who voted in 1972 thought they were voting on. That is the conflict. That is what is at issue here. And if, in fact, that is in conflict, which is to prevail: the 88 Senators who voted one way or the negotiating record?

To make the point, if we had a circumstance where 88 Senators thought they were voting on a treaty that limited the United States in certain ways and, therefore, voted on those assertions, made by the President of the United States and all the president's men who came forward at that time, if they voted a certain way and were later, after they voted, told by the way, the secret negotiating record, which we did not make available to you Senators, the secret negotiating record, to which you had no access, says something different—which do you think the Senate has bound the United States to? Did it bind it to what they said they were binding it to, or did they bind it to something that was fundamentally different than they all asserted they thought they were binding us to?

Senator WILSON. Mr. Chairman, the answer to your question is that they cannot bind the other party to that contract, to that treaty, and ignore the negotiation.

Chairman BIDEN. I don't agree.

Senator **Wilson**. Well, what you are saying is that whatever our belief and our construction is is of paramount importance, not the actual negotiation itself.

Chairman **Biden**. Absolutely and positively—unless the other side says by the way——

Senator **Wilson**. That is a strange principle and new to contract law.

Chairman **Biden**. It's called the Constitution. The U.S. Senate is required to give advice and consent to the President, and if the Senate says we bind ourselves to principle A, and then the side to whom they——

Senator **Wilson**. Mr. Chairman, perhaps——

Chairman **Biden** [continuing]. Let me just finish, if I may. If the party with whom the treaty has been drawn does not disagree—and the Soviets have not disagreed with what the Senate said it bound America to—then there is no, to use a legal phrase, no case in controversy. There is no issue.

The Senators who voted at the time said it meant A. The nation with whom we made the treaty said they think it means A. The President of the United States of America at the time said it means A. They are the prevailing notions.

My time is up. We are going to have a lot of time to debate this, I know. Regarding the question of maintaining the confidentiality of negotiation, I just would like to read from the Harvard Law Review, where Judge Sofaer says:

> Nations maintain the confidentiality of treaty negotiations in order to promote frank exchanges during the course of negotiations and to prevent negotiators from engaging in posturing for the benefit of their publics. As early as the administration of President Washington, the executive branch refused to release negotiating records to the Congress or to the public.

See Sofaer, "War, Foreign Affairs, and the Constitutional Power," pages 85–93, 1976, discussing President Washington's refusal to communicate to the House of Representatives records of negotiations leading to the Jay Treaty.

I yield to my colleague.

Senator **Wilson**. May I respond to the point that you have raised because I think it is critical.

The Senate may bind the United States unilaterally insofar as we see fit to do so. We may not bind the Soviet Union or any other party to a treaty to something to which they did not agree.

Chairman **Biden**. But what if they say they agreed to it, and they are saying they agreed to it?

Senator **Wilson**. If the record of negotiation shows that at the time they said something quite different, then I think you have a very serious problem, and indeed we do.

Chairman **Biden**. I thank my colleague for his point of view.

Chairman **Pell**. Thank you very much.

Senator Helms.

Senator **Helms**. Mr. Chairman, I thank you very much.

Senator Wilson, 6 months ago, the critics of what I consider to be the legally correct interpretation were focusing their attacks on the negotiating record that they claimed unambiguously supported a restrictive interpretation of the ABM.

This morning, however, Mr. Garthoff and General Allison based most of their case on the public ratification record of the treaty.

Why do you suppose the critics appear to have shifted the focus away from the negotiating record that you have reviewed?

Senator **Wilson**. I think the explanation for that, Senator Helms, is very, very simple and very clear. They are shifting away from it because they have found that it does not support their position.

Now, I could detail that at some length, but mindful of the admonition of the chairman that we are dealing with a classified record, I would only say this. Your point is very well taken that 6 months or so ago, the proponents or those who are attacking, I should say, the legally correct interpretation, tried to also suggest that the text of the treaty itself was clear and unambiguous.

Well, no one can seriously make this argument any more. I think it has been demonstrated that the treaty text can be read in several ways. Article V, as a case in point, of the text bans the testing and development of all components that are not fixed and land-based. But what does the word "components 'in article V include? The treaty is far from clear on this point, as any objective reading discloses.

So, I think that a number of critics—Henry Kissinger's name has been mentioned today—have recently said that the broad interpretation is the most cogent, nonredundant reading.

The answer to your question, Senator, is that they are moving to the ratification record because they hope it will support their position, but it is very clear that the negotiating record, which, in fact, is what frames the obligations of the parties to the treaty, does not.

Senator **Helms**. Incidentally, I have been dealing with Dr. Kissinger and tried to get him here this morning, but he was in Tokyo when we reached him, and he got back to this country too late to prepare to be here.

Mr. Chairman, as I have indicated to you, Dr. Kissinger will be available at a later hearing, and I think he will amplify on what Senator Wilson said.

Chairman **Pell**. That is correct. We plan that he will be here toward, I believe, the end of March, and Judge Sofaer will be here, too, to give some additional balance to this.

Senator **Helms**. I think that is fine, and let me say publicly that I appreciate the cooperation of the distinguished chairman of the Foreign Relations Committee.

Senator, one more question.

On the basis of your review of the negotiating record, can you reconcile what you have read and reviewed relative to current Soviet claims that the United States is lying—you cannot put any other word on it—lying when we raised the legally correct interpretation of this treaty? What reason do you believe would cause the Soviets, other than propaganda purposes, to make that contention?

Senator **Wilson**. Well, I think they recognize that they can make that contention and do so with impugnity because they are protected by the secrecy of the record itself. I think that it is clear that at the time of the signing of the treaty, they felt that they enjoyed a technological edge, and also that once the treaty was signed, we would abide by it, whether they did or not.

I think it is now clear that their position is changed; they see the United States as having embarked upon a technological advance that they think threatens to overtake them. So now they are for an interpretation that would constrain us not technologically but in terms of the confines that the law, as they read it, would impose upon our technology.

I think that that, incidentally, was an observation made by Max Lerner. I think that is the answer.

But the whole point is they can do so with impugnity for as long as this record remains secret.

I think, Mr. Chairman, that we ought to have the public have access to this, have reporters, legal analysts all over it with a magnifying glass to give it big attention. That way, we will not have to speculate how many teeth there are in the horse's mouth. We can actually open them and count them.

Senator HELMS. The Senator is absolutely correct.

My time is up.

I thank the Chair.

Chairman PELL. Thank you very much, Senator Helms.

I would add a word of very strong welcome to Senator Fulbright. As I think back, it was just 20 years ago when you were sitting right here, where I am now, and almost singlehandedly you led this committee and changed public opinion. Until those hearings that you held in this very room that we are now, it was considered unpatriotic to talk about peace, negotiation, or things of that sort.

We all remember those days when even to have the picture of a dove on a Christmas card was considered un-American. "Bring back the coonskin cap" was the phrase of the time.

I think many of us forget 20 years ago how remarkably hawkish we were, really, as a nation, in an impossible war. I think you did a great deal to make the change possible.

I think the work of this committee and the work of hundreds of thousands of demonstrators and young people, and the fact that the people who were being killed were increasingly the children of the middle income, as well as the poor and the black—these three equal factors in my view is what turned us around, or we would still be in that war in Vietnam.

So I thank you for being with us and would love to be able to think I could do anywhere near as fine a job as you did as chairman.

Would you agree, Senator Fulbright, that under Agreed Interpretation D, it was to allow the development testing of fixed land-based systems only, with any deployment to be allowed only after discussion and agreement? In other words, it was a pretty narrow definition.

Mr. FULBRIGHT. Well, I thought this was developed by General Allison and Ambassador Garthoff, the signficance of it. Of course, as they said, it leaves an open way to proceed to do what the administation wants to do after discussion with the Soviets and an amendment to the treaty.

I do not understand the reluctance of the administration to offer an amendment to the treaty or to withdraw, either one. It is a perfectly logical way to do it.

I must say it is difficult for me to understand the significance of this negotiating record. In the procedures of this committee, for example, you have long discussions on many controversial issues in executive session. But once the committee acts, it makes a decision and it brings out a bill and it is acted on by the Senate, I don't think you can upset that, upset it by referring to the discussion that took place in executive session.

The only significance of that discussion might be to clarify a particular phrase, word, or something in which it was admitted there was some double meaning or difficult meaning. But this is not as to the intent of the bill.

Why do we keep our executive sessions in the committee secret for 20 years, which is the normal practice? It is for the same reason that was stated a moment ago, that you keep the negotiating record closed—it enables them to speak frankly, and so on. But I do not think anybody has ever agreed that what is said in the executive hearings is controlling on what is said or done on the floor of the Senate.

Chairman **Pell**. When you floor managed this treaty and we were voting on it in the Senate, was it clear in your own mind that it applied a clear, unequivocal ban on the development, testing, and deployment of the exotic weapons systems, sea-based, air-based, space-based, and mobile?

Mr. **Fulbright**. As a general proposition, anything that would weaken the certainty, you might say of retaliation, anything that would weaken the principles there of vulnerability would seem to me to make the peace unstable.

The virtue of this, which has worked, one could say, since then—there has been considerable confidence that we were not going to have a war because there was this sense of vulnerability that is referred to by Secretary Kissinger—at that time he was Secretary—who was strongly in support of this treaty, as I was.

I think the principle was valid. It is valid. It has served the country. I think anything that weakens the certainty of retaliation is an exposure to war, if you like. It is a weakening of it.

Chairman **Pell**. Thank you very much.

In response to Senator Wilson's suggestion about declassifying the record, I think we should take very seriously the view of the executive branch in this as well, and look at this as a question of risky precedent. I have not made up my mind if I would support his resolution or not

Mr. **Fulbright**. Mr. Chairman, I think if you made it public, I don't see how you could argue that that controls over what was understood and agreed to on the floor of the Senate.

I do not understand the principle of what these negotiators—and I don't know, some of them we know who they were—but are they to take precedence in their action over what the Senators agreed to and what was in the public record?

Chairman **Pell**. I agree with you. The agreement itself must prevail, and that is what I would be inclined to follow.

Mr. **Fulbright**. Well, it seems to me in any contract, even not in governmental matters, it is what they finally agree to and not what somebody wanted or expressed a desire for or might think of in the negotiating stage. It is what they finally agree to that ought to be determining.

Chairman **Pell**. Thank you. My time has expired.

Senator **Wilson**. Mr. Chairman, before Senator Sarbanes begins his questioning, if I might make a comment, you might want to ask the same question of Senator Nunn this afternoon, because it was he and Senator Levin and others who insisted that the negotiating record be made available to the Senate because of the high value that they placed upon it as actually determining the obligations.

I think if we are going to discuss contract law and make the analogy to the treaty, it is what is indeed agreed; and where that is clear and unambiguous, you do not have a problem. In this instance, what the Senate did was rely upon not its own agents, but, rather, the agents of the Executive. So I do not really see a parallel to the normal contract situation.

Chairman **Pell**. Thank you very much.

My time has expired.

Senator Sarbanes.

Senator **Sarbanes**. Well, we will be hearing from Senator Nunn, and I think he can state his position. But I do not think it is as it has just been described.

The fact of the matter is that Judge Sofaer sought to use the negotiating record in order to place a new interpretation upon the treaty which no one, up to that point, had held.

I want to join in welcoming Chairman Fulbright before the committee. We are very pleased to have you here, Mr. Chairman, and I join in the recognition of your extraordinary contributions to our Nation.

Let me put this question to you.

My understanding of treaty law is that the interpretation which the Senate placed upon it became part of the record that was then invoked when the treaty was actually promulgated by the two parties to it. Otherwise, a Senate reservation or understanding would be rendered absolutely meaningless.

Senator Wilson is putting the proposition that the Senate could have a treaty submitted to it which was explained in a certain way, both to the Senate and publicly, understood by the Senate in a certain way, and on the basis of that understanding, advised and consented to by the Senate by an overwhelming margin; and then, later the administration could come along with a negotiating record, with a totally diametrically opposing view of what the treaty meant, and that that record would then be the meaning of the treaty.

That just wipes the Senate out. I mean, you might as well not have an advice-and-consent function of the U.S. Senate in that case.

An administration would only have to conceal things to come up with a totally different interpretation.

How does the Senate have any role to play under that view?

Senator **Wilson**. Are you asking me, Senator? I would be happy to answer?

Senator **Sarbanes**. No. I am asking Chairman Fulbright.

Mr. **Fulbright**. Well, I think you are quite right.

As I have said, I think the negotiating record is not relevant to upsetting the meaning of what was agreed to. It might be relevant if someone wishes to propose an amendment or to withdraw, to cite this as a reason why they may have misunderstood. But the document that we agreed to is a binding agreement, it strikes me, without any question.

Senator **Sarbanes**. Well, you did not have access to the negotiating record when you acted on this treaty, did you?

Mr. **Fulbright**. No.

Senator **Sarbanes**. You didn't know what was in the negotiating record.

Mr. **Fulbright**. No, we didn't.

Senator **Sarbanes**. So, on what basis, then, did you proceed to ratify the treaty?

Mr. **Fulbright**. On the basis of our understanding of what the treaty meant, and it was, of course, given to us. We had witnesses, the Secretary of State and others, from the officials who did have access or who knew about the negotiating record, as to what they said it meant.

There was very little dissent at the time. I cited the dissent. There were two votes against it, and the reason they voted against it was because of the very fact that is at issue today, it was so restrictive. They believed, and even those who opposed it, believed it was restricting, as we use that term today, too restricting, and they voted against it.

All the rest of them took, I would say, what we would call the restrictive interpretation and voted for it—88 against 2.

Senator **Sarbanes**. Under this treaty, the United States could withdraw after having given 6 months' notice. Is that correct?

Mr. **Fulbright**. That's right. It still can, or it can propose an amendment.

Senator **Sarbanes**. Well, if the administration has made some judgment that they no longer want to adhere to the terms of the treaty, why do they simply not give 6 months' notice and withdraw from it?

Mr. **Fulbright**. Either way—it strikes me that would be the honorable way. The straightforward way would be to either withdraw, give notice of 6 months, or propose an amendment and negotiate with the Russians and bring in an amendment and submit it to the Senate—rewrite the treaty, in other words.

It seems to me that is the open and aboveboard way. To do this indirectly, by reinterpretation, does not seem to me to be an honorable way to handle it.

Senator **Sarbanes**. Thank you, Mr. Chairman.

Chairman **Pell**. Senator Kerry.

Senator **Kerry**. Thank you, Mr. Chairman.

Mr. Chairman, I have an opening statement which I would request unanimous consent to be included in the record.

Chairman **Pell**. Without objection.

[Senator Kerry's opening statement follows:]

OPENING STATEMENT OF SENATOR KERRY

Senator KERRY. Mr. Chairman, it was Francis Bacon who recalled the legendary 7 Wise Men of Greece as saying that laws were like cobwebs—the small flies get caught—but the great break through.

I am reminded of Bacon's comments in looking at the Reagan administration's attempt to reinterpret the ABM Treaty.

The ABM Treaty was drafted carefully. It is not an ambiguous document. Article V of the Treaty says that the United States and Soviet Union have agreed "not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based or mobile land-based." Article III limits deployment to one ABM system of 100 interceptors and 6 ABM radars. Article I prohibits deployment of a national territorial defense, and providing a base for such a defense.

Those Treaty articles created a web of restrictions and the development and testing of ABM components and systems, and the President's SDI Program, conceived of just 4 years ago, has begun to be caught by that web of restrictions devised by the U.S. lawyers who negotiated and drafted the treaty.

I have read the record of public hearing on the ABM Treaty, as well as the pronouncements of the U.S. Government on many occasions after the ratification of the treaty prior to the day 18 months ago when Robert McFarlan issued his surprise reinterpretation of the treaty. It is clear to me that the broad interpretation was not the interpretation understood by the Senate when it approved the treaty, that it was not the interpretation understood by the negotiators who negotiated the treaty, and that it is not an interprepation consistent with the text of the treaty.

Rather, I think we should recognize the broad interpretaion for what it is—an attempt by the administration to deal with the web of restrictions against development and testing of ABM components and systems by breaking through the web entirely.

Because there is no court of law which can enforce this treaty, no judge to judge the arguments made by the administration, no ultimate authority to force the administration to live by the terms of the treaty, we in the Senate must decide whether the web of law created by the ABM Treaty is one which we wish to see remain whole, or are content to have tattered by the SDI Program.

Today, we begin a process of reviewing the treaty history, hearing from the men who negotiated it, and from constitutional scholars on the implications of the administration's attempt to rewrite the meaning of this treaty. I hope by the time we complete this process, it will be clear to all that the administration's reinterpretation is unfounded, and that the Senate has a responsibility to preserve the treaty by insisting on the interpretation of the treaty which was the understanding of the Senate when the treaty was approved. It is my hope that first this committee and ultimately the Senate as a whole will adopt binding language to protect the historic and only legally proper interpretation of this treaty before the administration can do to the ABM Treaty, what it has already done to SALT II.

Thank you, Mr. Chairman.

Mr. Chairman, I would also very much like to join in your comments and Senator Sarbanes' comments welcoming Senator Fulbright.

From a personal perspective, this is quite a role reversal here today. I remember 16 years ago, when it was Chairman Fulbright in the course of those hearings that you talked about who graciously allowed a spokesperson for a band of ragtag veterans here in the city to be heard. I recall that as certainly one of the most important days in my life.

I know that the chairman's willingness to listen and the manner in which he received all of us in Washington during that period was instrumental in helping to add to the debate and to let yet another perspective be heard.

So, for as long as I am alive and beyond certainly a career in public life I will be grateful to the chairman for that opportunity as well as for his role in that effort. I thank him for his continuing efforts to make a contribution to the country and to the work of the U.S. Senate.

Mr. FULBRIGHT. I thank the Senator for his kind words.

Senator KERRY. Thank you.

Without going into any of the classified material, there was a statement which I think Senator Wilson made at the outset of his comments which I, at least, flagged. I would like to ask you about it quickly.

You said that your review of the record did not show that there was any restraint on futuristic development. Is that correct?

Senator WILSON. The negotiating record, Senator, shows that what the Soviets finally were willing to agree to was Agreed Interpretation D, and Senator Specter's line of questioning to Mr. Garthoff earlier I think is precisely correct. That was agreed upon after it had originally appeared in earlier drafts as part of the treaty itself. The Soviets insisted that it be a minute to the treaty.

Now that minute, Agreed Interpretation D, sets forth that futuristic systems, to use your term, or as language in Agreed Interpretation D itself is, it uses the phrase "based on other physical principles," that those things were to be subject—first that there was no limit on development and testing. I am not sure what the phrased used by General Allison this morning, "research testing," means. But there were to be no limits on development and testing of such future systems, but that they would have to be, if deployed, if deployment were advanced, there would first have to occur both discussion under article XIII and under article XIV—consultation under XIII and agreement under XIV.

Senator KERRY. I have talked at considerable length with John Rhinelander. I have read Senator Levin's summary. I have talked at great length with other people who were part of that negotiating process, and have read the entire public record.

It is my understanding—correct me if I am wrong—that when you say there was no limitation on futuristic, that was as to the development of futuristic pertaining to land-based systems. There was an understanding that at the moment, only certain technologies existed. This is why the language says "currently consisting of," and if that language did not refer to the sense that other things might be developed, that would be surplusage, there would be no reason for that language.

So, the lack of restraint on futuristic was only as to land-based systems. Isn't that correct?

Senator **Wilson**. No. No.

I think what you would find if you read not only the public discussion, but if you look at the negotiating record, is that what they were talking about in Agreed Interpretation D was entirely different than what was actually covered in the body of the treaty itself, in the formal articles. The reason for that is that the language that you mentioned, "currently consisting of," resulted from an exchange, an agreement, in which the Soviets said that they would be willing to have the word "currently" inserted before "consisting of," provided that it were clearly understood that futuristic system limitations would be discussed not in the articles of the treaty but in a separate minute; and the separate minute is to be read separately, consistent with their desire, and what it says is that there is no limit on testing and development.

The Soviet position was that yes, there could be futuristic components, which they strictly defined in article V as in article II, as consisting of interceptor missiles, launchers, and radars.

Senator **Kerry**. That interpretation is obviously directly at odds with the people who negotiated it, with Senator Levin, and I believe will be at odds with Senator Nunn's reading later.

Senator **Wilson**. Well, I have read Mr. Levin's material, and one of the faults that I find in it is that he omits, he makes a comment that Judge Sofaer did not discuss the Rhinelander memorandums. I don't know how he could have missed it, but he obviously has missed two single-spaced pages in the Sofaer memorandums that do, indeed, discuss and criticize the statements in the Rhinelander memorandums as being conclusory and unsupported by anything in the negotiating record.

Chairman **Pell**. John, I believe your time is up.

Senator **Kerry**. I did not see that the clock had run out.

Let me close with a comment.

I had a line of questioning that I wanted to raise relating to the critical issue which was raised by Senator Sarbanes. Let me add to the confusion, perhaps, by calling this to your attention. Senator Buckley, one of the two who voted against it on August 3, 1972, said, as his understanding, and I quote him, "The agreement goes so far as to prohibit the development, testing, or deployment of sea, air, or space-based ballistic missile defense systems. This clause in article V of the ABM Treaty would have the effect, for example, of prohibiting the development and testing of a laser-type system based in space."

According to Senator Buckley, who favored the development of that testing, "The technological possibility has been formally excluded by this agreement."

That was the understanding of Senator Buckley at the time that he voted, and he was one of two who voted against the treaty for that reason. This relates to the second line of questioning that I wanted to ask, but I will have to wait and see if there is an opportunity to do that.

Thank you, Mr. Chairman.

Chairman PELL. Thank you, Senator Kerry.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

The exchange which Senator Wilson and Senator Kerry have had is illustrative of the problems of not having the record available for full analysis. I am not sure at this point as to my own conclusion on narrow versus restrictive, and I do not think it is possible to come to that conclusion without further analysis with Ambassador Garthoff and General Allison and others, which requires going into a great many complicated fact situations.

That raises the issue as to whether it is in the public interest to have a release of the negotiating record. My inclination is that it is. But I am not sure, in terms of the public policy considerations against them, to have the secrecy and confidentiality for the freedom of negotiators.

Senator Fulbright, I would be interested in your view on this issue. There is a longstanding practice to maintain confidentiality of a negotiating record and not to have it disclosed, so that negotiators may feel free to negotiate, to make concessions, without looking bad at a later time, when their positions were changed and they may have retreated from their positions.

Here we have a situation where a substantial period of time has elapsed, where we have significant public interest, where assertions are made on all sides by a great many Senators and a great many other people about what the facts are, and those facts are contained in secret documents.

We have a strong principle in this country about openness and about disclosing the facts for public scrutiny, as well as Senate scrutiny. At the present time, that negotiating record cannot be looked at by any staff except for the staff of the majority leader, the minority leader, the chairman and ranking member on Armed Services and Foreign Relations. So, 94 Senators cannot have their staffs do the work.

This does not lead itself to having an analysis with Senators going to that room and poring over those records, which are very voluminous.

Chairman PELL. If the Senator would yield for a moment, the reason for that—and it was passed, as you know, by resolution in the Senate—was the executive branch did not want to release those documents to us except with those conditions attached to it.

Senator SPECTER. Well, I realize that you do not necessarily like it yourself, Mr. Chairman, and you and I discussed the matter. I tried to get staff access to it and it is a tough matter.

Should we take it up with the Soviets to get their consent for the release of the record? That hardly seems appropriate, but maybe it ought to be considered.

I would be interested in your views, Senator Fulbright, as to whether there ought to be public disclosure of the negotiating record at this time.

Mr. FULBRIGHT. Well, as I said a moment ago, I do not think it should be, on the same principle as executive hearings in this committee, and all committees, I think, are not open to the public. We call them executive. They are not public in order to allow people to talk freely. You are examining something in a preliminary way, hoping to reach a resolution and a consensus. If everyone knew that was going to be public, it would be a great restraint upon free and open discussion. Or, in another way, it is sometimes an inducement to posturing and to making speeches which may not be particularly relevant.

For the orderly process of legislation, which is not unlike negotiation, I do not think it ought to be made public.

Now, we have the principle that this, after 20 years, with the consent of the members involved, may be made public. But the members involved always have the right of striking out something that they said which they do not particularly like, which is a good reservation.

In effect, it means it is confidential, those preliminary discussions, and the negotiating record is a preliminary discussion between the parties. I do not think it should be made public. It would further dampen the prospects of fruitful negotiations in the future.

I do not believe in it. I think it is a bad policy.

While we are on that, you did not ask me, but I am not at all sure television of the Senate sessions is a very good thing, although they are public. That is a somewhat simply related question. [Laughter.]

I am too old-fashioned, Senator Specter, to think that everything should be out in the open. You need some opportunities for discussion of these issues, as we do between friends, because it helps to clarify your views. You do not want everything you said in that process to be public.

It seems to me that the resolution is quite simple. If these people who you have mentioned—Kissinger and others—and I assume from what Senator Helms said, he thinks Mr. Kissinger will now disavow what he said 15 years ago—if that is true, if people change their minds and we made a mistake, the very simple way is to either disavow the treaty or offer amendments. Neither one is so difficult. They are provided for in the instrument.

The thing I do not understand is why we go to all this trouble to try to do neither of the accepted ways of changing your mind if you want to change your mind.

Now I do not happen to change my mind. I think this treaty has served a good purpose and will continue to serve a good purpose. I think the underlying principle of vulnerability, as they say, is a valid one. It is the very essence of deterrence.

I do not have any confidence—and I do not wish to make a big point of it because I am not a technician—but I do not have any confidence not only in SDI or in any other machine to preserve the peace. I think it does not work. It never has worked. It only incites greater arms races, most of them.

But those are views of an old man, as you know. I may be quite out of order with the new generation who thinks it can accomplish anything with a computer. I don't even like computers, Senator. [Laughter.]

Senator SPECTER. Well, Senator Fulbright, if you line up computers and televising the Senate and disclosure of the negotiating record on one side, I think disclosure of the negotiating record is going to stand with computers and televising the Senate. We are not going to look backward.

The tough issue is whether we are going to inhibit future negotiations of treaties if we disclose this negotiating record. Will we inhibit future negotiators in a way that is contrary to our public interest.

Mr. FULBRIGHT. I think you will. I think you will make negotiators much more careful. They will not speak their minds freely. They will try to judge in advance what is going to be public and what is acceptable, I think. They will not be frank, open, and candid in their discussions.

I think to me this is quite similar to the way we used to have executive session. They were very freewheeling. When we knew that it was not going to be public, we said what we liked, and we often clarified our views and came to agreement, but only after vigorous debate.

Senator SPECTER. Well, Senator Fulbright, I don't think we use those too much anymore. We have a lot of discussions, but we don't put them on the record.

If something is on the record, speaking for myself, I expect to see it in print. I expect to see it publicly disclosed.

Mr. FULBRIGHT. Do you mean in executive session?

Senator SPECTER. Well, I have not been a party in my 6 years and 3 months to an executive session which has been recorded and not disclosed.

Mr. FULBRIGHT. Well, I have no doubt you have changed the principle. In the first place, the staffs are much larger than they used to be. Always, before we reported a bill, we would have what you would call executive sessions, and discuss it. You could ask that it be entirely off the record. But even if it was printed; that is, if it was taken down by the official reporter, you always had the right before it was published to correct it. You still do.

The committee sends me these old executive records. They have even within recent months.

Chairman PELL. If the Senator would yield at this point, I think it is a difference between the procedures of the two committees. Under the rules, each committee can decide how it will operate. We, in Foreign Relations, do have executive sessions, which are secret, or closed, until they are released, and I think that is 15 or 20 years later.

Senator SPECTER. There is not much point in having them released if you can change them. If you can rewrite the record, what is the point in releasing them?

Mr. FULBRIGHT. Well, you can change it, you can strike out—each Senator who participated is given the right to do that in order to protect, again, this same principle of allowing them to speak frankly in the discussion, the preliminary discussion of the final action of the committee.

Senator SPECTER. It is a troubling matter, Senator Fulbright.

I have been a party to many executive sessions where there is confidential, where there is classified information. Once the reason for the classification ends, then, in my judgment, those proceedings ought to be disclosed as well.

Here we have a complex issue which arises at many levels. We have contradictory interpretations as to what the negotiating record said. I have not, I repeat, come to a firm conclusion on my position of narrow versus broad. You have Senator Biden's very good proposition, how can the United States be bound to a treaty interpretation that the U.S. Senate did not understand. Can it be different from what the Senate understood?

But if you have a treaty, is the United States bound to something that the Soviet Union is not bound to? The basic treaty principle, as a matter of contract, is that there has to be mutuality. So, if the Soviet Union is not bound, is the United States bound?

Mr. FULBRIGHT. Well, I did't know the point is the Soviet Union is not bound by this treaty. Did you make that point?

Senator SPECTER. No, I am not making that point.

Mr. FULBRIGHT. Well, who does?

Senator SPECTER. Senator Wilson makes the point that the Soviet Union is not bound to a treaty with the narrow interpretation; that the underlying agreement of the parties and the meeting of the minds on this treaty, as Senator Wilson interprets it, not myself—not Senator Specter but Senator Wilson—and, Pete, I don't want to put too many words in your mouth, but you are here and you can change it—it is that the Soviets have agreed to a treaty which is different from the narrow interpretation.

Mr. FULBRIGHT. Well, they do not say they are not bound by it. I have not heard any Soviet say they are not abiding by and bound by the narrow construction.

Senator SPECTER. Well, the Soviets, a week ago in Geneva, said that they did not have any interest—Minister Vorontsov said they had no interest in narrow versus broad, that it was an irrelevant consideration so far as they were concerned; that what they cared about was what specific tests the United States wanted to undertake.

This narrow versus broad is a domestic debate.

Mr. FULBRIGHT. Well, those two statements do not seem to me to add up very well. If they are interested in how we interpret it, they are interested in whether it is broad or narrow.

They may not have the same appreciation of strict legal points that we do. I don't know about that.

Senator SPECTER. Oh, I think they do. I think they have a more pragmatic concern. The generalizations of narrow versus broad do not delineate the real issues, as far, at least, as the Soviet delegation and Minister Vorontsov were concerned.

Well, I asked you your opinion because we have great respect for your judgment, Senator Fulbright.

Mr. FULBRIGHT. Well, I thank you very much. But, as you well know, I am an old man, and I have been out a long time. Your procedures over here evidently have changed.

Senator SPECTER. Thank you very much, Mr. Chairman .

Chairman PELL. Thank you.

Senator Kerry.

Senator KERRY. I would like to insert here, without prolonging the debate on it, that I believe Secretary Gorbachev and statements from the Soviet Union have made it very clear that they are interested in abiding by the current treaty, as they understood it, in its narrow version, and, in fact, their insistence with respect to laboratory testing and field testing and the definitions which were the problem in Reykjavik only attest to that very fact. That has been the specific hangup.

What I would like to do very quickly is this. I think it is the critical issue around which we all have been arguing, and I want for the record mostly to try to clarify it a little bit more, if possible.

I ended my last round of questions with a statement by Senator Buckley, which shows what he clearly understood. He voted against the treaty because he understood that it banned certain actions that he wanted.

Senator Fulbright has testified here today as to what he voted on, and how he understood that, along with other Senators, at that moment in time.

Now, some do not like to pay a lot of attention to the Constitution, and recent actions in this country have underscored that. But article VI of the Constitution says that all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land.

Article II says that the President must take care that the laws be faithfully executed.

In another article, it is said that a treaty may be made only with the advice and consent of the Senate, with two-thirds present.

So, obviously, the Constitution established a very clear Senate voting process, prerogative, and only with that Senate process can the treaty become law, which the President must then carry out.

My question is what is the constitutional basis for an assertion that 10 years after such law is created a secret document, which no Senators who voted at the time saw, and was, in fact, expressly withheld from the Senate, what is the constitutional basis for asserting that the supreme law of the land, which the President must carry out, is other than what those Senators voted on at that time?

What is the constitutional basis for that?

I ask Senator Wilson that question.

Senator WILSON. Senator Kerry, I think it is not only noteworthy, but candidly shocking, that the debate took place at that time without reference to the negotiating record.

Senator KERRY. It may be. But it did. This is the law that was created. I mean, we are not trying to reexamine how the law got to be created. Sometimes we don't hear testimony up here. Sometimes we make a bad law.

Senator WILSON. Well, I think the answer to your question is that the Constitution defines the role of the Senate in giving advice and consent to treaties quite clearly. That role is fundamental.

But the lesson here it seems to me is not that the Senate's role is minimized unless the Senate itself affords to the executive branch an opportunity to withhold that record. I do not understand why they did that. I would have assumed that Senators would have insisted, as we have, on seeing the negotiating record.

Let me remind you that this was a bipartisan desire. Senator Nunn and Senator Levin were the ones who first raised the point, and I think quite properly so.

I would only take it further and say that I think we ought to make the record public, precisely because there are discrepancies between—and this is of key importance—there are discrepancies between that negotiating record and the ratification record, and what was understood by the Senators who voted on the treaty.

Now, there is a fundamental point that is absolutely inescapable, and that is that, whatever we may have thought, it does not indeed alter what was agreed upon between the negotiators; and it is the discrepancy that I find so deeply disturbing, because it does undermine the very process that was envisioned in the Constitution, in the advice and consent of the Senate.

Senator KERRY. Again, Senator, and I say this respectfully, I am not sure that you have told me what the constitutional basis is for the current change. I mean, you may regret the process as it was carried out, and it may indeed be lamentable—is lamentable, I am sure—that people were not more aware one way or the other.

The fact is that the U.S. Senate, with the requisite two-thirds present and voting, by a vote of 88 to 2, understood what they were voting on, voted in a certain way, gave the advice and consent to the President, and the President is duty-bound to carry it out.

Now, he may abrogate, and others have talked about that right.

I also would correct you. I was not Senator Levin and Senator Nunn who were the first to raise this issue. It was Bud McFarlane, who was the first to issue the notice of change.

Senator WILSON. It was Senator Levin who insisted that the negotiating record be provided to the Senate, and I think quite properly so.

Senator KERRY. I think it was only in retaliation for this—and "retaliation" may be a bad word—because defensively that was one way in which it was felt they could answer this notion that somehow there was an alternative interpretation and that it ought to be reconsidered.

Senator WILSON. I don't think it was retaliation, Senator Kerry. I am ascribing to them the motives that I think they had, which was an honest desire to get at the negotiating record to resolve this question.

I think that is commendable. I am certainly not criticizing them.

To the contrary, I think we all should be grateful.

Senator KERRY. Let's come back to the original, and, frankly, the most fundamental, question. By what right, what is the constitutional basis, by which we, or anyone, reinterprets, 10 or 12 years later, the law of the land, as expressly defined by the U.S. Senate? What is the constitutional basis for that?

Senator WILSON. Do you mean why open the record?

Senator KERRY. No, I do not mean why open the record.

Senator WILSON. I think the answer is that it is not a reinterpretation. I think that what you have is——

Senator KERRY. It is not a reinterpretation?

What are we arguing about then?

Senator WILSON. There is a great deal, I think, of misapprehension. I don't think anyone is going to question that.

Senator KERRY. If the U.S. Senate did not have the record in front of them, there is no interpretation—zero interpretation. The only interpretation was the public record of what they had in front of them.

So, what is the constitutional basis for changing the law, as they created it, at that time?

Senator **Wilson**. Senator, let me just explain this to you. I think you were out of the room when I had this discussion earlier.

The Senator can unilaterally place whatever burdens it chooses to on the United States. It cannot place whatever burdens it chooses to on the Soviet Union. A treaty of which there is, indeed, mutual agreement, can do that; but the Senate cannot do that itself.

Senator **Kerry**. I understand that. That is fundamental. Obviously we cannot. Nobody is trying to do that here. That is not what we are talking about. That has nothing to do with this issue.

Senator **Wilson**. Well, what is exactly, I think, what is at issue.

Senator **Kerry**. But it is not at issue in the least.

Senator **Wilson**. Well, I beg to differ.

Senator **Kerry**. The Soviet Union has never called for a narrow or a broad interpretation. The Soviet Union has said stick by the ABM Treaty.

By what right are we changing the ABM Treaty? That is my question.

Senator **Wilson**. The question has arisen as to the meaning of the treaty. The treaty itself, on the face of the text, is ambiguous.

Senator **Kerry**. Well, the U.S. Senate has not raised the question of the meaning of the treaty.

Senator **Wilson**. Well, if you are interested in the law of the thing, I would refer you to the restatement of the law of foreign relations, which says that the responsibility for interpretation is that of the executive branch.

Senator **Kerry**. Well, I have a copy of the restatement here.

Senator **Wilson**. And if the executive branch chose to exercise that, how and when is a matter that I cannot answer. I am not sure what prompted the McFarlane statement at the time it was made.

The point really is that the statement was accurate, and the statement is accurate and is reflected to be accurate by the negotiating record.

It seems to me that all those who are urging that we not really look at the negotiating record are saying that the negotiation that actually took place is irrelevant. It is only what the Senate thought it was. And that is fundamentally at odds with any understanding of contract law and the concept of mutuality that was mentioned by Senator Specter a few moments ago. It applies as well to treaties.

Senator **Kerry**. I am informed that the reporter of the restatement is going to be testifying himself later this afternoon, so we will have an opportunity to pursue that. I do know that in the law, Prof. Louis Henkin has observed that the obligation and authority to implement or enforce a treaty involves also the obligation and authority to interpret what the treaty requires. And since a treaty cannot be put into force without the advice and consent of the Senate, there is no treaty that can be made without the Senate input, clearly what the Senate put into force and what the law required is based on the public record of what the Senate created.

If the Senate created something without access to this record, as unfortunate as it may be, it seems to me that that is what we are stuck with.

I do not want to belabor this. This has gone on at great length, and I appreciate your candor and your answers. I really wanted to establish the record on it. I think it is an important part of the debate, and I appreciate your willingness to take this extra time, Senator.

Senator WILSON. Thank you.

Senator KERRY. Thank you very much, Mr. Chairman.

Senator WILSON. Thank you very much, Senator Kerry.

And thank you, Senator Fulbright, and Senator Wilson, for being with us.

Mr. FULBRIGHT. Mr. Chairman, I am sure I gave you the right letter a little while ago. I have an additional letter, actually another letter, which has six former Secretarys of Defense signing it. I would give that to you for the record.

Chairman PELL. Whichever letter you wish, or both letters, will be put into the record.

[The information referred to appears in the appendix.]

Mr. FULBRIGHT. If it is appropriate, in view of the act that there are always suggestions that the Soviets do not comply with SALT and with this treaty, I would like to offer for the record, if you do not have it available, a very clear statement by the Center for Defense Information, which, as you know, is directed by several, very distingusihed retired military officers, which is very good basic material on the subject. I would, if I could, offer that for the record.

Chairman PELL. Without objection, it will be inserted into the record.

[The information referred to appears in the appendix.]

Senator KERRY. Mr. Chairman, if I could just add one thing for the record, in further answering Senator Wilson's comment about the restatement, from the restatement let me just add this. With unanimous consent, perhaps it could be put into the appropriate place in the course of our discussion:

> Nevertheless, the President's determination is subject to any understanding, reservation, or declaration issued by the Senate when it gave its consent to ratification.

In a footnote, it says:

> Treaty interpretations by the President, following Senate consent, do not, of course, have the consent of the Senate.

I think the restatement is fairly clear. We will hear further on that this afternoon.

Senator WILSON. There is no question about the reservation, Senator Kerry. Of course, there was no reservation here. I do not think that is at issue.

Senator KERRY. It said "any declaration of understanding."

Senator WILSON. Any reservations also are made consciously—there is a conscious disagreement.

Chairman PELL. Without objection, it will be inserted into the record, without objection.

This hearing is recessed until 2 o'clock this afternoon, when Senator Nunn and three distinguished scholars will be with us.

I thank the witnesses for coming.

[Whereupon, at 1:13 p.m., the committees recessed, to reconvene at 2:05 p.m., the same day.]

AFTERNOON SESSION

The committees met at 2:05 p.m., in room SR-325, Russell Senate Office Building, Hon. Claiborne Pell (chairman of the Committee on Foreign Relations) and Hon. Joseph Biden (chairman of the Committee on the Judiciary), jointly presiding.

Present: From the Committee on Foreign Relations: Senators Pell, Kerry, Simon, Adams, Helms, and Kassebaum; from the Committee on the Judiciary: Senators Biden and Specter.

Also Present: Senator Warner.

Chairman **Pell**. The Committees on Foreign Relations and the Judiciary will come to order.

Our first witness this afternoon is our fine, distinguished colleague, Senator Sam Nunn of Georgia. We look forward with great interest to his statement.

STATEMENT OF HON. SAM NUNN, A U.S. SENATOR FROM GEORGIA

Senator **Nunn**. Thank you very much, Mr. Chairman and Senator Helms.

First, let me apologize for my voice. I made a very lengthy presentation on the floor of the Senate. I started off with a weak voice, and it has gotten weaker. So, I will do the best that I can.

If I start squeaking too much, I will get someone else to complete my statement. But I hope I can make it through.

Mr. Chairman, Senator Helms, members of the Committee on Foreign Relations—and I understand the Judiciary Committee is also meeting with you——

Chairman **Pell**. Correct.

Senator **Nunn** [continuing]. I am honored to have a chance to testify before you today on a very important subject.

I commend you, too, as leaders of this committee for calling this hearing, and also for joining with the Judiciary Committee because I think the two committees certainly have a joint interest in this particular subject. Treaties that we entered into and are ratified by the Senate, with the ratification articles delivered by the President of the United States, are not only of great importance to our foreign policy, but they are also the law of the land.

Furthermore, the Reagan administration, when it unilaterally reinterpreted the ABM Treaty, constituted in my view, a fundamental challenge, a constitutional challenge, to the Senate with respect to our powers and prerogatives in the area of treaties. I emphasize the word "unilateral," because reinterpretation, certainly, if we come upon additional facts is always in order; but I think consultation should have occurred with the Senate before this was announced back in 1985. To the best of my knowledge, it did not.

The seriousness of this challenge has been further underscored in recent weeks by the administration's new claim that testimony during Senate ratification proceedings has no standing in terms of establishing other parties' obligations under these treaties. In effect, the Reagan administration is telling the Senate not only that the executive branch is free to ignore the meaning of a treaty, as originally described to the Senate, but also that other nations who have been parties to such a treaty can also disregard what the Senate of the United States was told.

I am certain that this novel doctrine will receive close scrutiny during your hearings.

Mr. Chairman, Senator Helms, before I present the results of my review of the record before the Senate, which is essentially a legal matter and a research matter, let me make a few comments about the overall context in which the Senate must consider this reinterpretation issue. I think this overall context is of immense importance.

First, I do not believe that the reinterpretation debate should be cast in terms of whether one is for or against the ABM Treaty. This treaty was accepted in 1972 by the Nixon administration and the United States Senate on the assumption, first, that the Soviet Union would strictly observe its terms, and, second, that a significant reduction in strategic offensive arms would be accomplished within 5 years.

Neither expectation has been fulfilled.

The Soviet Union has not restrained its relentless expansion of its strategic offensive forces. The Soviets' massive investment in strategic defenses, primarily air defenses, while not—and I emphasize "not"—a violation of the ABM Treaty, does contradict the spirit of the agreement; that is, that both sides recognized and accepted that there can be no shield against retaliation. That was the heart of the ABM Treaty in spirit.

Violations, such as the Krasnoyarsk radar, undermine the integrity of the agreement.

So, in light of these circumstances, the Soviet Union must recognize that the United States commitment to the ABM Treaty cannot be deemed unilateral, unalterable, or openended, whether or not the traditional interpretation of the treaty is upheld.

So, the Soviet leaders should not mistake our internal debate here on what meaning the treaty means as indicating a lack of concern with their strategic offensive weapons and the violations which we believe have occurred.

If arms control or unilateral strategic modernization efforts, such as moving to mobile ICBM's, fail to restore credibility to the strategic balance in the future, the United States may well have to deploy strategic defenses designed to protect its retaliatory forces and command, control, and communications. Unless the ABM Treaty could be amended to permit such deployments, this action would, necessarily, require the United States to exercise its right under the supreme national interest clause of the treaty, to withdraw on 6 months' notice.

Certainly, a U.S. decision to withdraw from the ABM Treaty would be enormously controversial at home and abroad. I am not—and I emphasize "not"—I am not counselling this course at this time.

Nonetheless, the American public and our allies need to understand that if we cannot solve current strategic vulnerabilities through arms control or through our own strategic programs or some combination thereof, we may have no recourse in the future but to consider deploying some form of strategic defense.

Second, those who support the reinterpretation in the name of accelerating the deployment of the strategic defense initiative may be laboring under a fundamental misimpression.

There is a strong case that the strategic defense initiative's early deployment system, now favored by Secretary Weinberger, cannot be developed or tested under either interpretation, either the broad or the narrow. So, those who believe that by going to a broad interpretation, we can go out and test and develop this space-based kinetic energy system in my view are on a very thin reed.

Finally, those who would cast this issue as a question of whether one is for or against Soviet violations of arms control agreements miss the point, in my view. There are other, more honorable, responses available to the United States.

These include, first, insisting that the Soviets correct the violations, as we are doing and have done; second, if that fails, taking proportional U.S. responses in accordance with international law; and third, as a last resort, abrogation of the agreement itself if violations are not corrected.

Mr. Chairman, for over 200 years the United States has stood for the rule of law, as embodied in our Constitution. The reinterpretation issue should be approached not with an eye toward near-term gains, but, rather, with a decent respect for the long-term interests of the rule of law in this country and the continued integrity of this Constitution, that magnificent document whose 200th birthday we celebrate during this year.

Mr. Chairman, at this point I will submit for the record of your proceedings my comprehensive review of the Senate ratification debate in 1972 and the implications of those proceedings for current executive branch conduct. If I could put the entire text into the record, I would appreciate it. It is a rather lengthy document with footnotes and also some appendices.

Chairman PELL. Without objection, it will be so included.

[The information referred to appears in the appendix.]

Senator NUNN. I will attempt briefly to summarize this overall research project and opinion.

The record of the ratification proceedings supports the following conclusions, in my view, about the scope of the ABM Treaty.

First, executive branch witnesses——

Chairman BIDEN. Excuse me. Are these the classified documents or hearings, or is this the Senate ratification process?

Senator NUNN. Senator Biden, everything I am speaking on today is the Senate ratification process. I am not referring to anything classified today.

Chairman BIDEN. Thank you.

Senator NUNN. Later this week I hope I will have ready an analysis of the negotiating record itself, which is classified. One of the dilemmas there is how you address that subject in a nonclassified forum.

Chairman BIDEN. Thank you.

Senator NUNN. First, the executive branch witnesses clearly stated to the U.S. Senate that development and testing of mobile space-based exotics was banned, while development and testing of fixed land-based exotics was permitted.

That is fundamental. There is a distinction between fixed land-based futures or exotics or lasers, whatever the term is, and mobile space-based; one being banned, the other being permitted.

Second, key Members of the Senate, including Senators Henry Jackson, Barry Goldwater, John Sparkman, and James Buckley, were directly involved in the dialog and debate concerning the implications of the treaty which the record indicates they clearly understood to ban testing and development of mobile space-based exotics.

Third, the reinterpretation is based on two categories of incomplete, imprecise, or general statements, those which indicate that exotics cannot be deployed, and those which indicate that R&D on lasers is permitted.

However, each of these statements can be read as consistent with either the traditional interpretation or the reinterpretation.

Furthermore, all but one of those occurred early in the proceedings, before clarifications were brought out in the course of detailed questioning in the Armed Services Committee.

Mr. Chairman, this point is very important because the Sofaer reinterpretation hangs its hat, in terms of interpreting the Senate ratification debate, primarily on statements which could be interpreted either way. You could read them narrowly or you could read them broadly. For instance—and I have this in my written record in better form than I will give it here from memory—Ambassador Smith was quoted, and I think this quote is right—as saying that "futures are banned as far as deployment is concerned i.e., the deployment of futures is banned.

Well, that is cited by Judge Sofaer as inferring that Ambassador Smith would have gone on and said testing and development of futures is also banned had he believed in the traditional or narrow interpretation.

The problem with that is, first of all, he is proving a case or attempting to by something someone did not say. The second problem with it is if Ambassador Smith had said that, it would have been wrong, because if he had said the deployment, testing and development of futures is banned, he would have been including ground-based systems as well as space and mobile-based systems. And, if he had included both of those, he would have been dead wrong because on fixed land-based systems, you can test and develop; on space-based systems, you cannot.

Now, all the way through this reinterpretation opinion, you are going to find statements which can be interpreted either way, where he adds words that they should have said by some kind of inferential reasoning which I never was taught in law school. He comes to the conclusion that they would have gone on and said other words, had they believed in the traditional interpretation.

Well, I will not go into more detail on that, but I could come back to it in questions. I do think your staffs should read that analysis because we have taken each one of those statements and looked at them in that vein.

Fourth, the record of the Senate proceedings does not support Judge Sofaer's assertion that the record of the Senate ratification proceedings on the ABM Treaty and statements made at or near the ratification period can be fairly read to support the so-called broad interpretation.

On the contrary, the record of these proceedings makes a compelling case for exactly the opposite conclusion, that the Senate was presented with a treaty that prohibited testing or development of mobile space-based exotics.

Both the proponents and the opponents of the treaty understood the agreement to have this effect, and there was no challenge to this understanding in the Senate's approval of the treaty.

In summary, Mr. Chairman, Senator Helms, and members, I have examined the reinterpretation's analysis of the Senate ratification proceedings and found its conclusions with respect to this record not to be credible.

I have concluded that the Nixon administration presented the Senate of the United States with the traditional interpretation of the treaty's limits on mobile space-based exotics. I have also concluded that the Senate clearly understood this to be the case at the time it gave its advice and consent to the ratification of the treaty.

In my judgment, this conclusion is compelling beyond a reasonable doubt.

This finding does not address all issues raised by the reinterpretation.

In the two succeeding reports, I will examine the issues of subsequent practices of the parties and the negotiating record, and any final judgments must incorporate these assessments. I want to emphasize that. Just looking at the Senate record itself, I do not believe it to be totally conclusive.

Nonetheless, the finding that the Senate approved the ABM Treaty on the basis of its clear understanding and acceptance of the traditional interpretation has very important, serious ramifications for executive branch conduct.

Let me now address these implications.

In recent weeks, the State Department has raised a new theory, apparently pleading its case in the alternative. State has argued that, regardless of whether the ratification proceedings supported or support the reinterpretation, executive branch testimony presented to the Senate during the treatymaking process can be disregarded because "it has absolutely no standing" with the Soviet Union.

In my opinion, this argument is incorrect in the context of the ABM Treaty and is squarely in conflict with the constitutional role of the U.S. Senate.

Recent Soviet statements indicate that they now consider themselves bound by the traditional interpretation. For example, in the October 19, 1985, article in Pravda, Marshall Akhromeyev, the Chief of the Soviet General Staff, stated:

> Article V of the treaty absolutely, unambiguously bans the development, testing, and deployment of ABM systems or components of space or mobile ground-basing; and, moreover, regardless of whether these systems are based on existing or future technologies.

The Reagan administration has not argued that the Soviets do not now claim to be bound by the traditional interpretation; rather, the administration position, as stated by Judge Sofaer, is that "only after the U.S. announcement of its support for the broad interpretation in October 1985 did the Soviets begin explicitly to articulate the restrictive interpretation."

Since the Soviets clearly agree with the traditional interpretation at this point, the State Department's suggestion that statements made by U.S. officials during ratification proceedings have no standing with the Soviets is a curious argument. But let's flip it over on the other side and let us assume for the purposes hypothetically of discussion that the Soviets were not in a totally different position. Let us say the United States was insisting on the traditional interpretation and the Soviet Union was insisting on the broad interpretation. Then the question arises would the United States have any basis in international law for relying on the statements to the Senate of the United States during the ratification proceedings if we were insisting that the Soviets comply with the traditional view?

Again, I am hypothetically flipping this argument on its head.

As a matter of international law, the actions of the parties, including their statements, provide an important guide to the meaning of a treaty. As Lord McNair notes in his classic treaties, "The Law of Treaties," when there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the parties after conclusion of a treaty, sometimes called the "practical construction," has a high-probative value as to the intention of the parties at the time of its conclusion.

Furthermore, he also states, "When one party to a treaty discovers that other parties to a treaty are placing upon it an interpretation which, in the opinion of the former, it cannot bear, and it is not practical to secure an agreement on the matter, the former party should, at once, notify its dissent to the other parties and publish a reasoned explanation of the interpretation which it places upon the terms in dispute."

This is similar, Mr. Chairman, to the proposition under U.S. domestic law that if one party knows or has reason to know that the other party interprets language in a particular way, his failure to speak will bind him to the other party's understanding. Although not necessarily binding as a matter of international law, the failure to object to a publicly announced interpretation by another party to a treaty is clearly relevant to the treaty's meaning and its interpretation.

In the case of the ABM Treaty, these principles take on even greater significance in view of the attendance by Soviet officials at the Senate hearings on the agreement. Indeed, Senators Goldwater and Jackson noted the presence of one such Soviet official, who was apparently a regular attendee, during the extensive discussion with Nixon administration officials during a July 19 Armed Services Committee hearing in 1972 that dealt at length and in great detail with the specific question of the treaty's limitation in the area of lasers on ABM's, which is directly what we are talking about now in 1987.

Even if the presence of the Soviet observers had not been noted for the record—and, indeed, it was noted for the record—it is obvious that the Soviets, who understand how our treatymaking process works, monitored the proceedings and reviewed the public records. Based on their clear awareness of the interpretation being presented to the Senate, if the Soviets chose to enter into the treaty and let it go into force without raising an objection, the United States would have had, and still today would have, a very strong basis in law for insisting on the original meaning as presented to the Senate, particularly if the Soviets waited until 15 years later to undertake a different view of the treaty.

So I disagree with those who say that the Senate proceedings and what was said in those proceedings by Nixon administration officials has no bearing on the interpretation of the treaty itself. I think it is fundamental that it does have a bearing—not necessarily conclusive, but it is certainly evidence, and strong evidence, that the Soviets knew at that time what was being explained, sat in on the hearings, heard the disussion of lasers, and had a direct obligation, under contractual law and international law if they dissented from that view that was being expressed by the administration, to let that dissent be known.

As far as I know, we have no record that they did dissent.

Aside from the immediate issue of the ABM Treaty, I think it is important for us to get away from the ABM Treaty for a moment. It is contrary to the long-term interests of the United States to assert that the statements made to the Senate have no standing with other parties to the treaty. The international community is well aware of the constitutional role of the Senate of the United States in the treatymaking process, and they are on notice that the executive branch explains treaties to the Senate during the ratification proceedings.

It is to our national advantage to insure that authoritative explanations remain available as powerful evidence of a treaty's meaning in the event of an interpretive dispute among nations.

If we adopt the principle that statements before the Senate have no bearing on contracts between third parties, countries, and so forth, we are severely prejudicing our national interest in other matters, aside from the immediate issue of the ABM Treaty interpretation.

Also, I think it is important to note that by asserting that the executive branch may now disregard the views of those who spoke for the administration and those who debated the issue in the Senate, the State Department is arguing, in effect, that administration witnesses need not accurately reflect the Executive's understanding of a treaty. Instead, they are free to keep that understanding a secret and may mislead the Senate into consenting to a treaty which has a secret interpretation different from the meaning presented to the Senate.

I can imagine the frustration of people in this Body who voted against the Panama Canal Treaty or even those who voted for it if we found out in another 4 or 5 years that the Carter administration has a secret understanding of the treaty that was not presented to the Senate at the time we debated it.

I know that everyone on both sides of that issue would understand the frustration of that.

This line of argument has profound implications for the legislative process in general, and the constitutional role of the Senate in particular.

Executive branch statements to the Senate during hearings on a proposed treaty may provide important evidence on issues of treaty interpretation in the international arena. They fill an even more important role, however, in our own constitutional system.

Such statements are an integral part of the making of a treaty, often shaping its content and well-known to all parties to the proposal.

Under article II, section 2, clause 2 of the Constitution of the United States, the Presidential power to make treaties is subject to the requirement for advice and consent by two-thirds of the Senators present.

Article VI, paragraph 2, provides that treaties are the supreme law of the land, which results in giving treaties the same force and effect as legislation enacted after action by both Houses of Congress.

Louis Henkin, one of the leading constitutional authorities in this field—and I understand he will testify this afternoon—has noted that "although treatymaking has often been characterized as an executive function in that special sense in which the conduct of foreign relations is executive, constitutional writers have considered the making of treaties to be different from other exercises of Presidential power, principally because of the Senate's role in the process; perhaps, too, because treaties have particular legal and political qualities and consequences."

Hamilton, in the "Federalist Papers," No. 75, clearly believed the intent of the framers that treatymaking be a shared power between Congress and the President, based on mutual trust.

Madison also took the position that "there are sufficient indications that the power of treaties is regarded by the Constitution as materially different from mere executive power and as having more affinity to the legislative than to the executive character."

The Senate has played a vital role in numerous treaty negotiations through means such as the process of confirming negotiators, the statutory requirement for congressional consultation during the negotiations process, and informal discussion. Under current practice, when a proposed treaty is submitted, the Senate may consent to the treaty, withhold its consent, or approve it with conditions.

Because the Senate is an active participant in the making of a treaty, the hearings and debates are a vital source of information as to what the treaty means.

The nature of the issue and the testimony of executive branch witnesses may lead the Senate to attach conditions if there is a dispute as to a provision, or forego conditions if there is an authoritative statement as to the meaning of a provision.

The position of the State Department sends a clear message to the Senate: You cannot rely on our representations as to the meaning of a treaty. The adverse consequences of this proposition extend far beyond the ABM Treaty.

Our treaty relationships involve not only arms control but also trade and business matters affecting the economic well-being of our Nation. We cannot ask the public to support proposed treaties if the executive takes the position that uncontradicted formal representations by senior officials are irrelevant as to the meaning of a treaty.

Because treaties are the supreme law of the land, the position of the State Department, if accepted by the Congress of the United States, particularly the Senate, would compel the Senate to incorporate into its resolution of consent to any treaty an amendment or understanding for every explanation given by an executive branch witness that was deemed important, lest it be disavowed as unilateral after ratification.

Treaties so laden would sink under their own weight. It would be extremely difficult to achieve bilateral agreements and virtually impossible for the United States to participate in multilateral treaties.

In addition, the Senate would feel compelled to request in each case a complete record of the negotiating history in order to insure that no secret understanding would emerge contrary to assurances given to the Senate.

In short, in an effort to save the reinterpretation by asserting that executive branch statements to the Senate in 1972 by the then-Nixon administration are essentially meaningless, the State Department is risking a serious constitutional confrontation involving the executive branch and Congress, not simply on the ABM Treaty but far beyond. It wold be a mistake for the executive branch to compound the problem further by asserting the Senate has no role to play with respect to the meaning of treaties.

As a general proposition, the views of the executive branch on the interpretation of a treaty normally receive great deference from the Congress, as well they should. Application of that principle in terms of the meaning presented to the Senate by the executive branch at the time of ratification leads to an interpretation that mobile space-based exotics may not be developed or tested.

Under the reinterpretation, of course, such testing and development is permitted.

In this situation, many in the Senate may be inclined to apply the classic line of cross examination to the executive branch: Should we believe what you are telling us now or should we believe what you told us then? The Senate has a right to presume that executive branch witnesses are informed and truthful in their testimony, particularly when it comes to the Senate's constitutional role as a participant in the treatymaking process.

The State Department's assertion that the executive, in effect, may mislead the Senate as to the meaning of a treaty has the unfortunate effect of directly challenging our constitutional role. The effect may well produce a congressional backlash through exercise of the power of the purse and the power to raise and support armies in a manner that would give effect to the original meaning of the treaty, as presented to the Senate.

Finally, and this is the conclusion, and I appreciate members' patience, the Senate was clearly informed by the executive branch that the treaty prohibits testing and development of mobile space-based ABM's using exotics. This was an issue which key Senators viewed as a matter of great significance and which was directly addressed by the executive branch during the treatymaking process in statements to the Senate. These circumstances raise a number of possibilities with respect to the significance of other evidence as to the meaning of a treaty.

I emphasize that the Senate record is not the only evidence.

If the negotiating record, let's say, and the evidence of subsequent practice by the parties supports the traditional interpretation, of course, this would be consistent with what the Senate was told and the issue would be resolved beyond question. We would be bound under the treaty by that interpretation to the traditional view.

The second possibility is this. If the negotiating record and evidence of subsequent practice is ambiguous or inconclusive, there would be no basis for abandoning the traditional interpretation as clearly understood by the Senate at the time it gave its advice and consent on the basis of this understanding. Absent compelling evidence that the Senate was misinformed as to the agreement between the United States and the Soviet Union, the compact reached between the Senate and the executive branch at the time of ratification in my view should be upheld.

There is a third possibility. If the negotiating record and evidence of the subsequent practices of the United States and the Soviet Union establish a conclusive basis for the reinterpretation, this would mean that the Nixon administration signed one contract with the Soviets and the Senate ratified a different contract. Such a conclusion would have profoundly disturbing constitutional implications, to say the least.

In effect, the President would have to choose between the executive branch's obligations to the Senate and its contract with the Soviet Union. If he did not choose to honor the commitments to the Senate, the Senate would have to develop an appropriate response or risk having its role in the treatymaking process become meaningless.

Mr. Chairman, in two reports which I intend to present to the Senate within the next few days, I will address these other questions: First, the subsequent practice of the two parties; and, second, the treaty negotiating record with a view toward determining which of these three situations currently confronts the U.S. Senate and indeed our country.

I thank the Chair and all the members for their patience, and, again, apologize for my very poor voice.

Chairman **Pell**. Thank you very much, indeed, Senator Nunn, for a very clear and articulate statement, which I understand also was made on the Senate floor earlier this morning.

I thank you.

At this point, I would defer to my colleague, Senator Biden. This is a joint hearing, and he is not only chairman of the Judiciary Committee, but he is the ranking Democrat on the Foreign Relations Committee, too.

Chairman **Biden**. Thank you, Mr. Chairman.

Senator Nunn, thank you not only for your time but for what I found to be a very persuasive and elucidating statement.

Let me begin where you left off. You mentioned a third option, which is the President made a deal with the Russians that said A, he made a deal with the Senate that said B, and that provokes a real crisis.

How can the President bind this country and be required to honor a commitment made that the Constitution says cannot be made unless the Senate specifically consents to it? How can that possibly be done?

Senator NUNN. I think if a treaty itself and the negotiating record show clearly that the broad view was the intent of the parties, and if I am correct in that the Senate testimony showed clearly that the Senate ratified what is the understanding of the narrow view or the traditional view, we have a case of first impressions. I don't know that there ever has been a case like that. I do not have an answer to that.

I think it would be speculative as to where we would come out on it. The first obligation that I think the President would have is to come to the Senate of the United States, which was not done in 1985 when this reinterpretation occurred, and ask the Senate of the United States to enter into a dialog about the possibility of having an amendment to the treaty which would then be ratified in itself by the Senate. That, it seems to me, would be one of the avenues.

Another avenue I suppose that you could theorize is that the treaty itself could be deemed to be a document that had never been properly ratified since there would have been a ratification of a document that was never agreed on. So I do not think we know the answer to that, Mr. Chairman.

I think it is not clear.

Chairman BIDEN. Do you consider it important for the Senate to act, by resolution or otherwise, to reassert the requirements of the Constitution; that is, that we must be a party to whatever agreement is made?

Senator NUNN. Yes.

Chairman BIDEN. It is not correct that the President could conclude that the supreme interest of the United States, for failure to progress on limitations on offensive weapons, as was contemplated, is now in jeopardy and therefore under the provisions of the treaty he could give notice and withdraw.

Senator NUNN. That's right.

The treaty itself has a clear supreme national interest clause which permits 6 months' notice of withdrawal. There is no doubt about that, in my opinion.

Chairman BIDEN. You spoke to the proportional response.

Senator NUNN. I would add, though, that I think a President who terminates a treaty even under a supreme national interest clause would be well-advised to consult with the Senate of the United States, which ratified the treaty. Of course, that came up on the Taiwan Treaty with Senator Goldwater. The court never ruled conclusively whether the executive branch had that independent capability of terminating a treaty.

Chairman BIDEN. You have anticipated my next question. I share your view.

On February 10 of this year, a letter and press release from Senator Dole, the minority leader, to the President stated that "there is absolutely no legal basis" to claim that the President cannot reinterpret the ABM Treaty in a manner at odds with the Senate's understanding in 1972.

Do you agree or disagree?

Would you like me to reread the statement?

Senator NUNN. I think I understand it. I fundamentally disagree. I think that is contrary to law, both in this country, the law of contracts; it's contrary to international law; it's contrary to the practices of the Senate of the United States historically; and contrary to the Senate's best interests as an institution.

So I do not agree with it.

Chairman BIDEN. I could not agree with you more.

Let me ask you this.

In your capacity as chairman of the Armed Services Committee and as a person who spent a great deal of time on this particular subject, what is your view about how you respond to the request made by some of our colleagues to "declassify the negotiating record for the public's sake"?

It was suggested to us that we should pass a resolution asking the President of the United States to declassify the negotiating record of 1972 so the public could be aware of what that negotiating record would be.

What is your view on that issue?

Senator NUNN. My view of it is that I see a lot of upside for doing it and not much downside.

The downside would be diplomatic precedent, where other countries might feel that we were going to release negotiating records in subsequent years. But I think that one could be largely cured by informing the Soviet Union of what we intended to do, and at least giving them an opportunity to be heard on it. I cannot imagine that they would object to it.

It seems to me that it is in the interest of everyone, now that this debate is raging. We have selected portions that have been all over the newspapers. When you try to get into the negotiating record and try to rebut views that have been expressed by others, you find that you cannot rebut them even though the original statements that have been made are very assertive and dogmatic, and you have pointed in rebuttal. Those rebuttal points are classified.

I have been told that there are certain reporters who have had access to certain parts of this record, not from the Senate but from the executive branch. I cannot prove that. I don't know whether or not it is accurate. But it just adds to the overall confusion here.

It seems to me that a lot of interests would be served by declassifying the record.

Chairman BIDEN. My time is up.

Let me conclude by saying that it is a real disadvantage to act responsibly in these debates. Having served on the Intelligence Committee for 9½ years and on this committee for almost 13 years, that is always the case. Those selective declassifiers, who display less concern for classification, put you into the position of either you being as irresponsible as they and/or losing the argument on the surface, and it is a terrible dilemma which I think your suggestion might help to resolve.

My time is up. I yield to my colleague from North Carolina, the ranking member of the Foreign Relations Committee.

Senator HELMS. Mr. Chairman, I thank you very much.

Incidentally, Senator, you sound a lot better than you feel. I know it is a difficult thing.

Senator NUNN. Thank you.

I thought you were going to say "than I look." I was taken aback for a moment. [Laughter.]

Senator HELMS. Let me take a run at this from another angle. Are the Soviets violating the ABM Treaty?

Senator NUNN. Senator Helms, I think they are, clearly, on the Krasnoyarsk radar.

Senator HELMS. This next is a question that I am asked. Why are we so concerned with the technicalities and the dispute about what is the right on the one side and the right on the other of a 17-year-old negotiating record when the Soviets have violated fundamental provisions of the ABM Treaty?

How would you answer constituents in Georgia who may raise that question to you?

Senator NUNN. Well, I think it is a darn good question. It is not easy to answer except I consider them two different things.

One, we have a clear course under international law to respond to violations, and that is, first, to protest; second, to take it to the Standing Consultative Commission, which we have done. We have done both of those. Third is to take a proportionate response, and some of the radars we are now thinking about putting up I think we could contend might have some degree of proportionality to them. Fourth is to basically abrogate the treaty, based on the violations, if we believe it is against our supreme interest, and if we believe that they violate to the extent that our security is jeopardized.

We have all of those recourses.

But what we have here is the law of the land which is being reinterpreted. I think that is a fundamentally different thing.

I think the Senate, as I indicated, has a much larger stake than just this treaty. So, my contention is that the two ought to be separated and we ought to adhere to the law of the land or we ought to get out of those treaties based on the accepted international practices.

Senator HELMS. I agree with that. I think there are substantial grounds for the President giving the 6 months' notice and all the rest of it, or at least considering that, in view of the Soviets' willingness to violate it right and left.

Will Rogers once said—of course, Will Rogers died a long time ago—he said that the United States, as of that time, had never lost a war nor won a negotiation. I think this ABM Treaty is a pretty good example of it.

I had lunch today, Sam, with a principal figure in the negotiations leading up to the ABM Treaty. I was not in the Senate and you were not in the Senate then. We came into the Senate at the same time. He said that he was amazed that not one Senator at that time—not one—asked to see the negotiating records.

Now, maybe this ought to be a discipline on the Senate from now on with respect to treaties. As a matter of fact, I think we definitely should do our homework. And I am not being critical of anybody who preceded us. The way the Senate operates, half of the guys coming into the Senate vote on a treaty they never have read and know nothing about.

Maybe we have learned something from this.

But I think we are being taken down the primrose path.

Now I have a little bit of difficulty here. Mr. Dooley said on one occasion, talking about your party, to which I once belonged, Joe——

Chairman **Biden**. And we wish you were back, Jesse.

Senator **Helms** [continuing]. He said the Democratic Party done fell out with itself.

Now, on the one hand, we have the effort to ratify the Threshold Test Ban Treaty, without the Senate giving its advice and consent to the yet to be negotiated verification protocol.

Now, I do not understand how that could be proposed.

Second, there is an effort to bypass the Senate's treatymaking powers altogether by selectively legislating the SALT II sublimits.

Now, I find myself confused by this conflict. I think that that confusion is multiplied at least four to six times now by other Senators.

Let me ask you this, Senator Nunn. I will not ask you to talk much.

These Democratic arms control initiatives, are you concerned about the contradictions in them?

Senator **Nunn**. Well, I think to label them "Democratic" is a misnomer, Senator Helms. First of all, these two treaties were negotiated and signed by Nixon and Ford administrations.

Senator **Helms**. No, no. I am talking about what I just specified, the present effort to ratify the TTBT without the Senate giving its advice and consent to the negotiated verification protocol.

Senator **Nunn**. I understand. But I just want to make the point clear that those treaties were not signed by anyone other than Republican Presidents.

The other feature that I would point out is, having personally negotiated with Admiral Poindexter on this matter and having seen the President of the United States on it personally, they were fully in partnership with the agreement that was entered into before Reykjavik last year to send both of these treaties up and subject them to a vote of the Senate with some very narrow band of verification left up to the President. I think that it could not be considered a "Democratic initiative" in that sense. It was bipartisan.

Senator **Helms**. Well, they are in terms of what is the functioning of the Senate right now. But I am not trying to make a partisan thing out of it.

I am trying to emphasize the confusion that I see.

Do you favor legislating selectively the SALT II sublimits?

Senator **Nunn**. I opposed that last year.

I think the President has made a mistake by deviating from those sublimits because I think the Soviets can take certain steps that will be much more harmful to our national security than we can counter with because of their hot production lines and so forth.

So I think the President has made a fundamental error.

Last year I did not favor legislating those into law. I am going to be taking another look at it this year. A lot of it depends on how it is worded and whether the treaty itself is directly tied.

But I must say I share your concern about legislating by majority vote treaty provisions which require two-thirds vote. I think it is a legitimate concern.

Senator HELMS. That is all I wanted you to say. Thank you very much.

Thank you, Mr. Chairman.

Chairman BIDEN. Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Sam, first of all, you've never sounded better.

Senator NUNN. I don't know how to take that. [Laughter.]

Senator SIMON. I was just glancing through your statement and was trying to find this. At one point in your statement you said if we have problems, and then you outlined three steps that we could take. I agree with all three steps.

But isn't there also a fourth step, and that is that maybe you are assuming that we go before the Standing Consultative Commission to get things worked out?

Senator NUNN. Yes, Senator Simon. I thought I included that. But you are absolutely right.

Senator SIMON. Then, Senator Pell asked me to ask this question of you, if I may.

Senator Nunn, the administration has made much of a statement by Soviet Defense Minister Marshall Grechko, which raises questions about Soviet acceptance of the traditional interpretation.

Marshall Grechko told the Presidium that the treaty, and I am quoting, "Imposes no limitations on the performance of research and experimental work aimed at resolving the problem of defending the country against nuclear missile attack."

Could you comment on that statement by Marshall Gretchko and place it into perspective?

Senator NUNN. I think this is important.

First of all, from an institutional point of view and national point of view, I do not equate a statement by a Soviet leader before the Supreme Soviet with the same degree of accord as a statement made by an administration official before the U.S. Senate.

The reason I do not is because I do not accord the Supreme Soviet the same kind of independence and the same constitutional function as we have in this country. That is the first point I would make.

The second point is that the statement, as I have read it, does not define the words "experimental work." It is not clear whether that means research, whether that means testing, whether that means development, or where you draw the line.

The third point that I think ought to be made is there was no mention of "exotics," there was no mention of future systems here. So you really cannot tell whether he is talking about the continued research on upgrading components of then-existing systems—launchers, missiles, radars—which would have been totally consistent with either interpretation of the treaty. That is the third point. You cannot tell what he is talking about. So it is not definitive as far as indicating one way or the other which interpretation he was referring to.

The next point, even if you take the term "experimental work," and you conclude he meant development and testing by that, and even if you put a word in there which is not in there, like exotics, but assuming for the purpose of hypothetical discussion that he intended to cover exotics, though he does not say that, even if you did that, his statement would still be consistent with the traditional view because, I emphasize again, exotic testing and development, that is, testing and development of exotics or futures or lasers is entirely permitted for fixed land-based systems under the traditional interpretation.

So there is no way that this statement can be indicative of broad interpretation, nor could you say that it is indicative of traditional interpretation. It simply does not have any probative value one way or the other in that respect.

I am amazed that so much stock is put into this statement by those who favor the reinterpretation because it simply will not stand scrutiny. It does not have any probative value as between those two interpretations.

Senator SIMON. I thank you.

Let me just add that your full statement is one of the reasons your colleagues are very proud to serve with Senator Sam Nunn. You are a great asset to the Senate and to the Nation. We have great respect for you.

Senator NUNN. I thank the Senator.

Senator SIMON [presiding]. Senator Specter.

Senator SPECTER. Thank you very much.

Senator Nunn, I join Senator Simon in complimenting you on your treatise. So far we have only had a chance to weigh it, however. Now we will have a chance to read it. [Laughter.]

Senator NUNN. Well, I can assure you that if you are having trouble sleeping at night, if you take this with you, your problems will be cured. [Laughter.]

It is a tedious and boring subject, but it is important.

Senator SPECTER. Well, you are not suggesting that you fell asleep writing it, though.

Senator NUNN. Several times. Several times. [Laughter.]

Senator SPECTER. Senator Nunn, there have been other writings in the field. You have referred to Judge Sofaer, Legal Advisor Sofaer, and you made reference to one of his statements where you concluded the inference was not valid. And so, frequently there are references made to one of the aspects of testing or development and negative implications are drawn. For example, Senator Fong, in the debate, talking about the limitations in the ABM Treaty—this appears on August 3, 1972, at page 26707—he says, referring to the treaty, it "allows research and development on ABM systems to continue, but not the deployment of exotic or so-called future systems." That is used to raise the inference that when he says "deployment only," that you can do the other things, test and develop.

One of the references made by Secretary Rogers in his testimony——

Senator NUNN. Could I take that one just briefly, Senator Specter?

Senator SPECTER. Sure.

Senator NUNN. If you take that inference and you put the words "testing and development" in there, into Senator Fong's statement, and you say that you prohibit testing, development and deployment of exotics, that statement would be wrong.

Senator SPECTER. Because of the land-based issue?

Senator NUNN. Because you can test and develop fixed land-based systems.

So, it is not only an inference. If you put the words in there that are inferred by the Sofaer interpretation as to what should have been there, it would have been wrong, it would have been inaccurate, it would have been incorrect.

Senator SPECTER. One of the great difficulties in analyzing these statements is how much care was involved in the formulation of them, as you and I know.

Senator NUNN. Exactly.

Senator SPECTER. How much of it is staff work, how much of it is a clearcut analysis of the various systems involved.

I started to refer to some testimony of Secretary of State Rogers before the Foreign Relations Committee.

There is a fairly long quote which it might be well to read because in the early part it refers to "test and deploy," but it comes out only with the word "deployment," and, again, this raises a negative implication. I am not sure that this is one of Judge Sofaer's statements or one which you have dealt with. But this is illustrative, only, which is all we have time to do in a few minutes here today.

Senator NUNN. Right.

Senator SPECTER. As we have all said, we will have more time on the Senate floor, doubtless.

But this is the quotation that I have at hand, attributed to Secretary Rogers: "The parties will undertake not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based. They have also agreed not to development, test, or deploy ABM launchers for launching more than one ABM launcher missile at a time from each launcher, nor to modify launchers to provide them with such a capability." Something is omitted. "Perhaps of even greater importance as a qualitative limitation is that the parties have agreed that future exotic types of ABM systems: for example, systems depending on such devices as lasers, may not be deployed, even in permitted areas."

Now there in a context where Secretary Rogers has made a series of references to deploy, test, to develop, test or deploy, and then comes up with the statement that future exotic devices, systems depending on such devices as lasers may not be deployed—what would you say there? Would there be a reasonable inference that where he uses the word "deploy" it does allow for testing and development?

Senator NUNN. I don't think I would infer that because that would be doing the reverse of what Judge Sofaer has done. That would be trying to prove the traditional view.

Are you saying does it permit testing and development?

Senator SPECTER. I am saying that he says that the treaty prohibits deployment of exotic devices, such as lasers. Now, if you just have that language alone, you don't know what he has to say about testing and development.

Senator NUNN. That's right.

Senator SPECTER. But in the context where he has already used "test, develop, deploy," in a series, and then uses "deployment" alone, does that raise a reasonable basis for an inference that testing and development are permitted, at least according to what Secretary Rogers says?

Senator NUNN. No, Senator Specter, because again, if he had said "testing and development" on that last phrase, on exotics, and added those two words in there, saying "testing, development, and deployment" are prohibited on exotics, he would have been wrong, because testing and development of fixed land-based exotics is permitted under the traditional view.

So it would have been an erroneous statement. This is why I have so much trouble with Judge Sofaer's interpretation of this, because he not only is drawing an inference from words not spoken, but, more than that, had the words been spoken, they would have been wrong.

The only way he could have addressed that problem is he would have had to add another couple of sentences. He would have had to say deployment, testing, and development of exotics is prohibited. But he would have to put into parentheses that fixed based exotics are exempted from this.

Senator SPECTER. The great difficulty is that when these questions were asked and this testimony was given, these lines were not pursued.

Senator NUNN. Well, they were. If you look at this record—and I could go into it today, but I know you do not have time—Senator Jackson pursued this in depth.

Senator SPECTER. I have read his questioning.

Senator NUNN. The record is abundantly clear.

Senator Buckley had gone into this in depth, and I have recited this, though it has not been recited before, to my knowledge—he not only made a floor speech, which has been cited, but he testified before the Senate Foreign Relations Committee and went into great detail on why he opposed the treaty. It was precisely because it outlawed testing and development of lasers or futures.

Senator SPECTER. We are going to have to pursue that later in more detail.

I have one more question if I may, Mr. Chairman.

Chairman BIDEN [presiding]. Sure.

Senator SPECTER. I see the red light is up, so thank you.

This is on the conceptual framework that we are working in. I am not sure that I agree with you, Senator Nunn, when you make a reference that the President is going to have to choose between his commitments—you may have said "contract" with the Soviet Union—contrasted with his commitments or contract with the Senate.

Senator NUNN. No. If—if—the negotiating record shows that clearly the parties had a different contractual arrangement, but I have not concluded that at this juncture.

Senator SPECTER. That is what I was coming to.

I know you have not spoken on the negotiating record.

Senator NUNN. Correct.

Senator **Specter**. The concern that I have as we talk about the negotiating record is we may be getting ourselves into an impossible quagmire.

I cited your reference, as best as I could copy it down, when you testified about the President choosing between a contract with the Soviet Union and a contract with the Senate. I do not believe that the President has a contract with the Senate. I do not think there is a contract with the Senate like there is a contract with the Soviet Union. You have two parties to this agreement. There is the U.S. and the Soviet Union. The U.S. position is formulated by what the executive branch does and what the legislative branch ratifies. But those two components are as to one party to the agreement.

The United States has a contract with the Soviet Union. The President and the executive branch have obligations to the Senate, to the legislative branch.

Senator **Nunn**. I do not disagree with that, Senator Specter. What I tried to say, and what I thought I said, was that we could have a situation, theoretically, where one contract was entered into between the two superpowers and another contract was ratified by the Senate. I did not mean to say that the executive branch had a contract with the Senate. I don't think that is what I said.

Senator **Specter**. Well, if you have that situation—and I believe you said it is a matter of first impression—then what you may have is no treaty at all and no contract at all. To have a treaty and to have a contract, there has to be a meeting of the minds.

The United States and the Soviet Union have to have a meeting of the minds and agree on what they are doing here. If you have the agreement between the United States and the Soviet Union accurately reflecting the negotiating record, and if you have the United States position, to which the Senate has concurred or which it has ratified being at variance with the negotiating record, then you have the party of the first part, the United States, as embodied by the Executive and the Senate position, at variance with what the Soviet Union agrees to.

The question that arises in my mind is whether we are pursuing a course which is wise in getting into the negotiating record. The negotiating record we have touched on to some extent here today. If this treaty conceptually is upset because the negotiating record was not accurately represented to the U.S. Senate, then, for future treaties, any party dealing with the United States may have what it expects to be an agreement, a treaty, upset at a later time because the executive branch does not make an accurate representation to the Senate.

Now, it may be the Soviets or the other party have to be policemen. Maybe they have to come to all the sessions. And you have testified about an attendee. But I do not think in any stretch you can conclude that the Soviets are warranting to the process that they have checked what the executive branch is representing to the Senate and are satisfied with it.

Senator **Nunn**. I agree with that assessment.

I think it would be a first class, royal mess if that proves to be the case.

Senator **Specter**. That may be where we are heading.

Senator Nunn. I do not think it is where we are heading because——

Senator Specter. Well, it will not be if you conclude that the negotiating record confirms the narrow interpretation.

Senator Nunn. In terms of international law, as I understand it, the first thing you do is look at the treaty itself. If a treaty, on its face, is clear, then you do not go to the negotiating record.

Senator Specter. Right.

Senator Nunn. The second thing you look at is the practices of the parties. I would contend that part of that equation relates to the ratification representations made to the Senate.

Then, if neither of those clear it up, you go to the negotiating record.

Now, I am not sure, and I am not saying at this point, although I will address this Friday, that we even have enough ambiguity to warrant going to the negotiating record under international law. But I am going to address that subject in more detail.

Chairman Biden. Senator, would you make this your concluding statement, please.

Senator Specter. We are all proceeding as if the negotiating record is relevant.

Senator Nunn. I think you are making a good point. I am not sure that it is.

Senator Specter. It all may work out fine if the negotiating record agrees with Senator Nunn's opus. If the negotiating record agrees with this treatise [indicating], that is fine. But if the negotiating record does not agree with this treatise, then we are going to be in a splended position where we do not have a meeting of the minds between the United States and the Soviet Union, and you have a misrepresentation to the Senate.

Senator Nunn. Well, Senator Specter, if that happens, then I will not take the credit or the blame for it.

Chairman Biden. It will not happen.

Senator Nunn. That is precisely what the Sofaer reinterpretation has done to us. That is where we stand now. You know, that bed was on fire when we climbed into it. [Laughter.]

Chairman Biden. Let me say to my colleague from Pennsylvania——

Senator Specter. I don't know that it was. I do not think you would climb into a burning bed, Senator Nunn.

Chairman Biden [continuing]. That I agree with him completely. I am perplexed as to why he keeps raising the record, that we acknowledge is not relevant. But I am prepared to bet you lunch also that the negotiating record does not contravene or contradict this. I have no doubt about that.

But we will wait until we each make our judgment on that.

Let me just point out one thing before I yield to my colleague from the State of Washington, to whom I will give equally as much time as was given to the Senator from Pennsylvania. If we can put this in layman's terms, the Senate is an important party to this contract, that which we keep referring to as a contract. It is a little bit as if I decided to sell my family home, which my wife jointly owns, and I go out there and make a contract with a purchaser to buy my home for $100,000. But my wife signs on to a contract that says the home is being sold for $125,000. Under the law of the State of Delaware, she is a coowner of that property, and no matter what I promised, no matter what contract I made, no matter what secret arrangement I had, no matter what the negotiating record with the purchaser was, it is no contract, unless my wife signs. There can be no treaty unless the U.S. Senate signs on to it. It is that simple and that complicated.

I yield now to my colleague from Washington, and, hopefully, he will not sell my home. [Laughter.]

Senator ADAMS. Thank you, Mr. Chairman. I do not have any present plans for that, but I want to keep you uncertain. [Laughter.]

Senator, I want to join in the compliments that the others have paid you. I did listen to your full floor statement, and I want particularly to express my appreciation not only for its clarity but for your defense of Senator Jackson, whose words I believe were misinterpreted completely in an attempt by those who would say there is some type of broad or reinterpretation power and that this was not brought up and discussed in the Senate in detail and in particular in detail with regard to exotics on anything other than fixed land-based missiles.

Senator NUNN. Senator Adams, let me just say that I agree with that description. There was one point in the record—and I pointed this out this morning—in a dialogue with Senator Jackson, where, in a 7-page part of the record, 13 times the word "lasers 'was mentioned. He went into this in great depth. He understood it.

As a matter of fact, the witnesses before the Senate Armed Services Committee under his questioning clarified their own views as the treaty was examined by them, Dr. Foster being one who went back and looked at the negotiating record after having the dialog with Senator Jackson.

So, to say, as the reinterpretation says, that Senator Jackson did not address future systems is not just wrong—it is dead wrong.

Senator ADAMS. I was so pleased to hear you say that and wanted to bring it out in this record, because I think it is very important that we start from a flat position that we have a treaty, it was negotiated, it was signed, it was ratified by the Senate, and it has an interpretation.

I want to ask you this question. To the best of my knowledge, this is the first time that I am aware of the executive branch attempting to change, by a view of reinterpretation, a treaty, as opposed to simply abrogating it or moving under its terms to modify it.

Isn't that correct?

Senator NUNN. I really cannot speak to that in a definitive way, Senator Adams, because I have not researched other treaties. But I do not know of another instance like this.

Senator ADAMS. I do not either. That is all I am asking.

Senator NUNN. Certainly not on something this fundamental to the treaty itself. This is fundamental to the treaty.

Senator ADAMS. This is fundamental under article V. Not only that, there is a procedure under D, as I think you so well outlined today, that if there were to be any discussions about it, a path was set forth for that to occur.

Senator NUNN. That is right. Also, Agreed Interpretation D serves several purposes that have been lost in the recent debate. One purpose was—and this gets complicated—to protect the right of the United States to be able to actually deploy, not just test and development, but to deploy fixed land-based lasers or some other exotic which were not components, but, rather, less than components, which would be deemed adjuncts. So you could not have a device deployed in the future that was a component; but you could have a device deployed in the future which was a portion of a component.

Senator ADAMS. I remember that because I indicated this morning in my questioning that I happened to remember part of that debate, since I was in the House at the time of the ABM Treaty. One of the great problems was that hitting an incoming missile was described by several physicists in our area as like going into a dark room with a baseball bat and a flashlight and hitting a mosquito on the nose.

So, from that came a series of alternatives, including explosions in space, some as close with the Sprint as 25 miles, which then led to the conclusion that you would liberally dust the whole area you were protecting with nuclear debris.

I remember very well the reasons that land-based, as opposed to exotics was discussed in detail.

What I want to ask now is this. This being so, should it not be our position, as Senators, that if the President of the United States wishes to deploy or to go further than research, as defined in this treaty, that a preliminary step is that the President should either state the treaty is over or come to the U.S. Senate and ask for modification, or in some fashion come to us with a new treaty document before proceeding with the actual testing and use of components in space—I am not referring to land-based, but in space—as is proposed in SDI?

Senator NUNN. It gets very complicated as to exactly what you can test without violating the treaty. But if the test is a test of space-based exotics, it is my view, based on the record I have looked at thus far, but not yet addressing the negotiating record, that the administration should either seek an amendment with the Soviet Union under the terms of the treaty, or should declare it to be in our supreme national interest to terminate the treaty; because, unless one of those two avenues is taken, under the traditional view, we would be breaching the treaty.

Senator ADAMS. Senator, I agree with you completely. I think you have made a great contribution by analyzing it carefully and by both going on the floor so the American people can see it, and by being here in these committees, because it seems to me that that is essential and that we should go no farther with this matter of SDI until we clarify what we wish to do with our treaty rights.

I thank you for the analysis and for the help you have given to these committees.

Senator NUNN. Senator Adams, thank you very much. The only thing I would add on that is I do not think this precludes going forward with SDI. I think we can go forward with SDI, provided it stays within the terms of the treaty.

As a matter of fact, General Abrahamson had testified last year before our committee adhering to the narrow interpretation would have no real impact on SDI either in testing or development or otherwise until the early 1990's.

So I am bewildered as to why the administration has raised this point, has kicked up this legalistic type argument when it seems to me it was based on ideology rather than technological necessity.

Senator ADAMS. Senator, that is why I asked the question. I cannot understand, unless they are saying that they cannot do it without reinterpretation, why we are involved in this. It was not an attempt to mislead you on your position in any way. But if that is the position, as I understand it, that is being taken, that they have to have this reinterpretation, then it seems to me the other falls, and that becomes very important to what all of us do with this.

I am as bewildered as you are about why we are involved in this, unless it is required.

So I think General Abrahamson had better talk with whoever else is doing this so that at least we have one line of inquiry to respond to.

Senator NUNN. Correct. I agree.

Senator ADAMS. Thank you, Senator.

Senator NUNN. Thank you.

Chairman BIDEN. If I can help clarify your bewilderment, it is for the same reason they went above the sublimits of SALT II, which was not in our interest to do now, and was not necessary, and it could easily have been handled another way. It is an ideological question, in my opinion.

But let me yield to my colleague from Massachusetts and say to my colleague from Georgia that this is an interesting phenomenon. Usually, when Senators come and testify before other Senators' committees, it is a very perfunctory thing. It is a measure of our respect for your judgment, Senator, that we are keeping you here this long. I know that you did not plan on being here this long, but we have a lot of respect for your judgment.

Senator NUNN. Thank you, Mr. Chairman. I am glad to be here.

Chairman BIDEN. Senator Kerry.

Senator KERRY. Thank you, Mr. Chairman.

Senator, I, too, am sorry to keep you here further, and I will not keep you very long at all. I will just ask you whether you have addressed the issue of the negotiating documents that were not before the Senate during the course of its deliberations. Was that question asked of you?

Senator NUNN. We talked about that in general. I have not addressed that today. I am going to make a presentation later in the week on my view, my own individual view, of what the negotiating record shows.

Senator KERRY. That raises an interesting point. I would like to ask you a couple of questions, if I may, without necessarily asking you to express your opinion about that record now.

It seems to me that a question is raised here which we are going to face at some point in these deliberations. Do you believe that that record has an appropriate place in the Senate's current deliberation? Use of that record, which was not provided to the Senate prior to approval of the treaty, raises constitutional issues about the Senate's prerogative to advise and consent. Those who voted at that time voted without that record before them and purposely so. They voted with one particular perception in mind, that of the public record. Is it ever appropriate for us to be going behind, into the sub rosa record, which was not before the Senators as they created that law? Constitutionally should we do so now?

I wonder if you have a comment on that.

Senator NUNN. Thank you, Senator Kerry.

As to the international law, as I understand it, I think the first thing you do is look at the treaty itself. If the treaty itself is clear on its face, the matter is settled. If a treaty is ambiguous, then you go, as I understand it first, to the subsequent practice of the parties, and that includes, I think, the Senate ratification procedure, because that was an explanation by a party. The third item down the line is the negotiating record itself. I think it is appropriate, when there are ambiguities, to go to that record.

I do not say at this point, though, that there are enough ambiguities in the theoretical sense to warrant going to that negotiating record. I will be addressing that later in the week. But I do believe, as a practical matter, since the negotiating record has been used by the State Department and by the executive branch to justify the reinterpretation, we have no choice, as a practical matter, but to delve into that record and to understand it completely.

So I divorce the theory from the practice there.

Senator KERRY. The practice could, in fact, raise some serious issues.

I suppose you could say that the presence of ambiguity is the only time in which you could do it and, therefore, it would be inappropriate to have a treaty passed with some kind of sub rosa agreement which people try to assert later is the treaty, in place of what was passed.

But does that not put the Senate into a sort of secondary role? If you go back to the negotiating record, could not future agreements always have some secret, private negotiating peace which is held from the Senate?

Senator NUNN. That is exactly right. As I mentioned in my presentation here today, if this reinterpretation, based on the negotiating record, were to be accepted, I think in the future we would have to insist on every element of the negotiating record being examined by the Senate of the United States prior to ratification.

I think the administration's procedure in this regard, while it may advance a short-term interest, in terms of testing under SDI—if that is the motive, and, again, I am puzzled as to why it is necessary now—while that may be the case, I think they are severely prejudicing the executive branch's own interest in the ratification process on future treaties. This is because not only have they made it likely that the ratification record would be insisted on, but I think they will have made it likely that every important element of a treaty, that the Senate would insist on an understanding or a reservation that would have to require the executive branch to go back to the other party and renegotiate to make sure that it was agreed on.

So they have opened up a total nightmare by doing this. I do not know whether or not they realize it yet. But that is my view.

Senator **Kerry**. I thank the Senator very much. I also want to thank him for the enormous contribution which I think all of us feel that he has made on this and other subjects attendant to it.

Senator **Nunn**. I thank you, Senator Kerry.

Chairman **Biden**. Thank you, Mr. Chairman. We will look forward to your report on Friday.

Senator **Nunn**. Thank you. I appreciate this opportunity.

Chairman **Biden**. Our next panel comprises three respected authorities on constitutional law.

Prof. Gordon Baldwin is a professor of law at the University of Wisconsin School of Law. In 1975 and 1976, he was Counsellor on International Law for the Department of State. He is a former Fulbright Scholar and has also taught international law at the Naval War College.

Prof. Louis Henkin is a university professor at Columbia University Law School. He is a former co-editor in chief of the American Journal of International Law. His 1972 book, "Foreign Affairs and the Constitution," remains a classic work on the subject. He has recently completed supervision of the American Law Institute's new "Restatement on United States Foreign Relations Law."

Prof. Laurence Tribe is the Tyler professor of constitutional law at Harvard Law School. His 1978 book, "American Constitutional Law" received the Coif Award in 1980 for the most outstanding legal writing in the Nation.

He has prevailed many more times than he has failed in the cases that he has argued before the Supreme Court, although if we keep changing the Court the way we are, I suspect his batting average might change, which we are going to attempt not to have happen.

Gentlemen, it is most kind of you to take time away from your classes to be with us today. I hope you gave all of your students time off and did not give them another professor. I trust your students will understand.

In fact, your testimony today may make very interesting class notes for each of your students and your colleagues.

Gentlemen, if you would proceed in the way that I called you with your opening statements, then, in light of the way the attendance is at this moment, we will move to a 10-minute period of questioning each, unless we all of a sudden have a rush here.

Fire away, Professor Baldwin.

STATEMENT OF GORDON BREWSTER BALDWIN, PROFESSOR OF CONSTITUTIONAL AND INTERNATIONAL LAW, UNIVERSITY OF WISCONSIN, MADISON, WI

Mr. **Baldwin**. Thank you, Senator.

In view of my esteemed colleagues here, as the first speaker, I am going to present as small a target as I can, lest I be a victim of the exotic missiles thrown by my brethren here.

We agree on two major points. One is that the United States should not violate international law. I think we all agree with that.

Second, the executive branch can neither modify or alter a treaty without the further review or consent of the Senate.

At issue here is whether the State Department position represents an alteration of the treaty or a mere interpretation.

Now, obviously, the line between an interpretation and an alteration is not sharp. There is no single test for determining whether it is an interpretation or an alteration. But I submit that the party in the best position to make that judgment, at least in a preliminary way, would be the U.S.S.R. That the Soviet Union has not thus far objected to the position taken by the State Department is, I think, some evidence that the State Department position is merely an interpretation.

Now, there is no question that it is different from prior interpretations. This, of course, is the critical point.

I believe that Judge Sofaer is on good grounds when he takes the position that the executive branch may make a reinterpretation of a treaty. He does so publicly, in a way to put his feet to the fire, which you obviously are in the process of doing, and this is appropriate. When the executive department reinterprets a treaty which has been considered by the Senate, it is clear that the burden is on the executive branch to justify this departure.

Now, it seems to me also clear that the executive branch must interpret treaties just as the Senate may interpret treaties. There have been occasions in American history when the Senate and the President have disagreed. The first occasion that I can think of is an interpretation of the Jay Treaty of 1794, late in the Adams administration, where the President took the position that it was a self-executing treaty and required the extradition of a seaman caught in Charleston and wanted by the British. The Senate took the position that it was not a self-executing treaty and ought to be subject to further laws. The President in that particular case prevailed. The sailor was extradited back to his ship, was hung, drawn, and quartered—an unfortunate incident, but an example of a disagreement between the Senate and the President with reference to interpretation.

The Senate can, of course, accompany its advice and consent with a formal understanding on the meaning of a particular treaty.

I think it is a dangerous position to take when one claims that the understanding of the moment is fixed and indelible. We are, of course, anchored to the words, to the text of the treaty. But interpretations can change.

Justice Holmes once noted in what I think was an income tax case that a word is not crystal clear and unchanging but represents the skin of a living thought. There is nothing novel about a reinterpretation of a text.

We have seen this with respect to the 14th amendment to the Constitution and the construction given to equal protection. Indeed, the Supreme Court has stated that interpretations of equal protection do change and are responsive to changing times and events.

Similarly, the meaning of laws have been changed over time. One of the major examples of this in recent constitutional history is the determination by the Supreme Court that the 1866 Civil Rights Law constituted an equal housing ordinance or law. This was *Jones* v. *Mayer*.

The ABM Treaty, it seems to me, must be interpreted narrowly, but meaning least restrictive on the United States. For some reason, that is called the broad interpretation. But it seems to me that the broad interpretation really is the narrowest possible interpretation of a treaty.

In conclusion, I say there are six reasons and principles which justify an interpretation of the ABM Treaty that is least restrictive on the United States of America.

The first is the obvious point that the State Department interpretation is an interpretation that invites continuing negotiations. I think it is highly desirable that the United States and the Soviet Union sit down and parley about the arms race and the arms problems. The Sofaer interpretation calls for further negotiations. To that extent, I think it is a wise interpretation.

Chairman BIDEN. Excuse me, but is it, in fact, contingent upon further negotiation, or does it invite it because he has unilaterally made a judgment that they may disagree with?

Mr. BALDWIN. Yes, sir. It is a unilateral interpretation. There is no question about it. And because it is a unilateral interpretation, by its own force it calls for a response.

I think that is not all bad. I think it is a very wise idea in the international arena to call for responses from the Soviet Union.

The second point is this. The arms treaty is not like a statement filed with the SEC. It is not even like an extradition treaty. It is not like a tax treaty. It is the kind of arrangement that calls for continuing negotiation. It is not really a marriage settlement. You do not settle a continuing relationship by referring to the marriage contract made 17 years ago. It is the surest way one knows to reach a divorce. It calls for continuing negotiation.

My third point: A least restrictive construction of the treaty is consistent with the notion that sovereignty should not be limited, except by explicit concessions.

Fourth, I think it is very important in the international arena that we not promise more than we can safely deliver. It would be a false promise, it seems to me, to construe a treaty in such a way as to hobble the entire defense effort of either nation. I think one has to take the position that U.S. claims of particular sort are the kind of claims that we would have to honor if the Russians made them on us.

Chairman BIDEN. Excuse me. Isn't there a provision in the treaty, though, that if we are hobbling ourselves, we can just pull out, the supreme interest provision?

Mr. BALDWIN. Yes, that is absolutely true. But is that the only way in which the treaty obligation can be interpreted?

It seems to me that the right to terminate should also include the right to suggest interpretations, which invite a response, by their very nature. I think that is desirable.

Chairman BIDEN. Can they take effect and still be a treaty prior to the response?

Mr. BALDWIN. If it is an interpretation, Senator, yes. If it is a moderation or an alteration, of course not.

But I do not think the State Department is claiming that it is modifying the treaty, or altering it. They are interpreting it.

As I say, it is a thin line.

The last point is one that has not been made explicitly by the State Department but has been hinted at by members of this committee, namely that the Sofaer interpretation might be considered as a response—"retaliation" doubtless is too strong a word—but as part of the international negotiation process of dealing with the Soviet Union. If they have interpreted the treaty in such a way that it seems to be detrimental to our interests, we are, in response, entitled to make interpretations that are favorable to our interest.

This, of course, invites continuing negotiation.

There is nothing more important than continuing negotiation.

In short, I think it would be unfortunate if this committee took the position that any interpretation of a treaty which deviates in the slightest from that understanding at the time the treaty was negotiated would not be in either the interests of the Senate or the interest of the United States. Treaties do reflect a continuing relationship, relationships which can change over a period of time. They are not marriage contracts.

Chairman **BIDEN**. Thank you very much.

Professor Henkin.

STATEMENT OF LOUIS HENKIN, UNIVERSITY PROFESSOR, COLUMBIA UNIVERSITY, NEW YORK, NY

Mr. **HENKIN**. Thank you, Mr. Chairman and members of the committees. Since my prepared statement is short, it will be more expeditious if I read, but I will not read it all.

Chairman **BIDEN**. Please do. We have time.

Mr. **HENKIN**. Thank you.

In responding to the invitation to testify on the resolution before you, I do not come to offer my views as to the proper interpretation of the 1972 ABM Treaty. I appear as one who has studied our Constitution and its jurisprudence, particularly as it relates to the conduct of foreign affairs, to address the subject of section 2 of the proposed resolution, which is also the subject of subsection 1 of section 8, the declaring section of the resolution.

My position is simple. I hang it on the text of the Constitution, which is not in dispute, and the meaning of which is not in dispute either.

The Constitution provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

For present purposes, we may reduce that constitutional provision to a simple proposition: the President can make a treaty if the Senate has consented to it. Of course, the President can only make the treaty to which the Senate consented. He cannot make a treaty other than the one to which the Senate consented.

It follows that the President cannot make a treaty with a text different from the one to which the Senate consented; he cannot make a treaty with a meaning different from the one to which the Senate consented.

In considering treaties for possible consent, the Senate has on numerous occasions expressed itself on the meaning of one provision or another. Sometimes the Senate has made sure that the meaning it gave to a treaty provision would prevail, by insisting that the United States enter a reservation reflecting the Senate's interpretation. If the Senate does so, the President can make the treaty for the United States only subject to such a reservation.

Sometimes the Senate has refrained from proposing a reservation but has expressed its understanding of a provision. Again, the President can make the treaty only subject to the Senate's understanding. He must make the Senate's understanding the U.S. understanding, and a condition of U.S. adherence to the treaty.

The principles I have articulated and the practice I have described have not been disputed in the past and are not controversial today. They govern, I believe, the draft resolution before your committees. The President can only make a treaty that means what the Senate understood the treaty to mean when the Senate gave its consent. That is indisputable when the Senate has made its understanding plain in the form of a proposed reservation or an explicit understanding. The same principle governs when the Senate's understanding of a treaty provision is not expressed in a formal resolution, but is apparent from the Senate's deliberations leading to its expression of consent.

The Senate's understanding of the treaty to which it consents is binding on the President. He can make the treaty only as so understood. He cannot make the treaty and insist that it means something else.

The principle that the President can only make a treaty as it is understood by the Senate would govern even if the Senate has given no indication of its understanding of the treaty. In that event, it must be assumed, in the absence of any evidence to the contrary, that the Senate understood the treaty to mean what it would be understood to mean by reasonable people, reading the text of the treaty in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose.

That understanding must be assumed to have been the interpretation given to the treaty by the Senate. That interpretation, therefore, is the interpretation which the President must adopt for the United States when he makes the treaty.

These principles seem to me to be the indisputable implications of the treaty provision in article II, section 2, of the Constitution.

Now, let me be clear. I am not suggesting any special prerogative for a later Senate to interpret a treaty made by a President with the consent of an earlier Senate. See the *Fourteen Diamond Rings* case in the Supreme Court. I am not suggesting even that the Senate today can determine finally and exclusively the understanding of the Senate which gave consent to a treaty in the more or less distant past, though such a determination by the Senate today, if made after careful study, would deserve to be given great weight. Nor am I addressing the extent to which, as a matter of international law, the Senate's understanding of a treaty, if not communicated to other states parties to the treaty, is binding on those other states.

But for our own constitutional purposes, the only treaty which the President can make, under article II, section 2, the only treaty that is a treaty made under the authority of the United States for purposes of Federal jurisdiction, under article III, section 2, the only treaty that is the supreme law of the land, under article VI, clause 2, is the treaty made by the President with the consent of the Senate, as understood by the Senate when it gave its consent.

I understand from what has been said here today that members of the committee may want to address questions to me on matters other than and beyond what I have said. For the present, Mr. Chairman and members of the committees, I thank you for inviting me to express my views, and I will be glad to entertain any questions that I can answer.

[The prepared statement of Mr. Henkin may be found in the appendix.]

Chairman BIDEN. Thank you for a concise and precise statement as to what I and others view as the central issue here.

We will come back to questions later.

Professor Tribe.

STATEMENT OF LAURENCE H. TRIBE, RALPH S. TYLER, JR., PROFESSOR OF CONSTITUTIONAL LAW, HARVARD UNIVERSITY, CAMBRIDGE, MA

Mr. TRIBE. Mr. Chairman, I am honored to appear before this joint hearing of the Foreign Relations and Judiciary Committees. So that I might avoid reading my prepared testimony, I hope it might simply be entered into the record as though read. I would like to talk briefly and extemporaneously and then answer questions.

Chairman BIDEN. Without objection, your entire statement will be put into the record, as if read.

Mr. TRIBE. Thank you, Senator Biden.

I think it is more than a little ironic that an admnistration that prides itself on strict construction of the Constitution and of acts of Congress now champions a broad and a loose construction, in my view a radical reconstruction, of a major treaty.

I think it is also ironic that an administration that stresses the importance of fidelity to the intent of the Framers is willing, in this case, to regard that intent as somehow less important than secret records.

The thrust of my testimony today is that such a reconstruction, based in large part on not a public record, but a confidential record of alleged negotiations, represents a challenge not only to the treaty, but to rather basic and enduring constitutional principles; that, as Senator Nunn suggested, will have relevance well beyond the reach of the ABM Treaty and its fate.

In essence, my concern is that the Constitution itself could become the first casualty of Star Wars, and that the strategic defense initiative is quite needlessly starting out with an offensive against the separation of powers and an assault on the Senate's constitutionally specified role in the treatymaking process.

Now, in the resolution introduced by Senator Biden today, it is stressed that in the ABM Treaty, as submitted to the Senate in 1972, and as formally accompanied by the Secretary of State's letter of submittal of June 10, 1972, there was a central, functional purpose. Senator Fulbright earlier elaborated that functional purpose I think with great eloquence. Clearly, that functional purpose of preserving mutual vulnerability would be so radically undermined by the proposed reinterpretation in which future systems, space-based, exotic, are suddenly exempt, that one would start legally with a very strong presumption against that view.

Now, my colleague suggests that it is not like a marriage contract; that it ought not be read restrictively. That is all a very nice generalization about how one should read agreements. But when, as Senator Biden and others have pointed out, the debate within the Senate itself made very clear that people were voting either for or against this treaty on a very explicit understanding that it would not be rendered obsolete by technological developments, when Senator Buckley and Senator Allen make the application of this treaty to space-based futuristic systems the explicit ground of their negative votes, then bromides about marriage and about general contract principles are quite beside the point.

The issue becomes to what degree does the Constitution of the United States permit a President, any President, to reconstruct a treaty's meaning unilaterally—and you can call it an invitation to dance or an invitation to negotiate, but it is a unilateral reconstruction—by adopting what seems to me any fair reader would have to view as a de facto amendment, based largely on secret negotiations between a prior President's men and, in this case, Soviet negotiators back in 1972.

I think if one simply focuses on the relationship between the President and the Senate in the treatymaking process, it will be clear that the gambit of the legal advisor, in alleging that the secret negotiating record vindicates his implausible reading of the treaty, is fundamentally and profoundly counterconstitutional.

What is it, after all, that the Senate consents to if not what the executive branch has presented to it?

Now, Senator Biden this morning quoted from a portion of the legal advisor's article back in June 1986, in which he made much of President George Washington's refusal to let the House of Representatives see certain secret records of the negotiations leading to the Jay Treaty. But there are two key differences between that episode and this. The first, which I think is perhaps too obvious to belabor, is that the House of Representatives has no official role in the treatymaking process. The Senate does. It has the role of advice and consent. If the Senate believes that it cannot intelligently exercise that role in a particular case, without seeing some part of the negotiating record, then the Senate has a remedy available to it. It can decline to give its consent without seeing that record.

The Senate might decide in the interest of future treaties that it would be better not to demand to see that record; but that remedy is available to the Senate. That remedy is rendered utterly meaningless if the President could present one picture to the Senate of the United States in order to obtain its consent and then whip out another picture, based on a secret negotiating history in order to generate, in effect, another treaty.

There is a second difference between this situation and that to which the legal advisor had reference, and that is that the issue here is not really the secrecy of the negotiating record. It is the selective use of portions of a secret record to revise history—I might say something of a specialty of the administration in the foreign policy area.

There is no way the Senate can play its role, the role contemplated by the Framers of the Constitution, if its consent is obtained on one set of submissions, only to have the President or a successor produce a secret record which, supposedly, paints a different picture. That treats the Senate of the United States as an outsider, even an adversary, as though it were the Soviet negotiating team and not the U.S. Senate whose advice and consent our Constitution made the final word.

There is a parallel problem with respect to the interpretation of acts of Congress. There the Supreme Court of the United States has consistently held that the only relevant legislative history is the history on the basis of which the Congress voted and the President either signed or vetoed the relevant measure. Indeed, one of President Reagan's most notable judicial appointments, that of Chicago law professor Frank Easterbrook, now on the Seventh Circuit, becomes relevant here because in a 1984 article on the subject of legislative history, Judge Easterbrook wrote, "what was not presented is no law."

It seems to me that absolutely the same holds with respect to matters not presented to the Senate for its advice and consent under article II.

Now, Senator Nunn suggested that, nonetheless, if there is some crucial ambiguity left, after one conscientiously examines the text and the practice, it might be appropriate then to have reference to the history.

I do not think that is the issue before the Senate of the United States now. The issue, rather, is whether, where the language could hardly be clearer and the practice is consistent with the language, one can generate an ambiguity by selective leaks from a confidential record, which had nothing to do with the constitutional structure by which the Senate played its role in the ratification process.

Chairman BIDEN. If there is no ambiguity and there is no inconsistency in practice for 12, 14, or 15 years, is there any constitutional basis to move to the record?

Mr. TRIBE. I think there is none, Mr. Chairman. I think that when Senator Kerry asked the same question of Senator Wilson—that is, where does he find a constitutional basis for dredging in the record—it was conspicuous that Senator Wilson did not answer. Senator Wilson said the Senate perhaps should have demanded then to see the record.

On that question, wiser heads than I have spoken. Senator Fulbright has suggested that sometimes candor would be compromised if one always wanted to see the record. Senator Nunn has suggested that, if one made a practice of always pulling in the record, treaties would fall of their own weight from all of the reservations that would have to be added to them.

But in any event, that does not get to the heart of the issue. As you asked, Mr. Chairman, is there any constitutional basis for going to the negotiating record when there is no ambiguity, no decisive ambiguity. I think the answer is that there is none.

Let me just close by saying that a few years ago, the U.S. Supreme Court, in the *Legislative Veto* decision, made reference to the hydraulic pressure that each of the branches feels to exceed the outer limits of its power. I think that hydraulic pressure, which perhaps affected the Congress when it asserted the power of legislative veto, has now victimized the executive branch. That pressure is every bit as likely to flood the White House basement as it is to inundate the halls of Congress.

I think it would be a terrible shame if the importance of the arms control issue at stake in this debate were to obscure the enduring constitutional issue posed by distorting the ratification structure for a highly result-oriented purpose. I am afraid that that is what is going on.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Tribe may be found in the appendix.]

Chairman BIDEN. Thank you.

Let me start. I would say to my colleague of North Carolina that before he came in I said we would move to a 10-minute rule since there are only three of us, if that is OK.

Senator HELMS. Fine.

Chairman BIDEN. Let me begin with Professor Baldwin.

Professor Baldwin, I would like you to tell me whether or not, as a law professor, you would agree with the following statement: There is absolutely no legal basis to claim that the President cannot reinterpret the ABM Treaty in a manner at odds with the Senate's understanding in 1972.

Let me read that again.

There is absolutely no legal basis to the claim that the President cannot reinterpret the ABM Treaty in a manner at odds with the Senate's understanding in 1972.

Do you agree with that statement?

Mr. BALDWIN. I do not think I do, if I understand it correctly, Senator, and I will try to be brief.

Both the President and the Senate have an interest in interpreting treaties. How is the President going to determine exactly what the Senate intended? If the Senate's understanding of a treaty is placed, as Professor Henkin says, in a former understanding or a reservation attached to a treaty, the President is on very weak grounds, the weakest possible, when he tries to reinterpret the treaty.

But if the treaty has been ratified or given advice and consent without these formal understandings, then it seems to me the President is somewhat more free to interpret the treaty.

Conditions change. As I say, treaties invite continuing relationships, especially an arms control treaty, which is different from a tax treaty or an SEC filing.

The President is obliged, it seems to me, by separation of powers theory, to inform the Senate, as the Executive Department has informed it in this instance, when a reinterpretation takes place, and the Executive Department has the obligation of justifying it.

The Senate is entitled, as it is doing here, in putting the Executive's feet to the fire and testing whether or not the Executive interpretation is wise.

Chairman **Biden**. Let's step back from this treaty for a minute. I want to make sure I understand what you are saying.

Do you mean to tell me that if there is a treaty provision and then there is in addition to that a Senate understanding as to what it means, the President still could go back and reinterpret that later?

Mr. **Baldwin**. There might be an occasion when the President might be able to do that.

Let me give you an example.

This is in light of the theory of Locke and Montesque, where Locke, for example, wrote in his Second Treatise on Civil Government, I think it is chapter 12, that the nature of executive and legislative power and their relationships differ when it comes to foreign affairs, and that is simply because the legislature can only legislate for the people and the issues over which the legislature has control. The legislature lacks authority over foreigners, people outside its jurisdiction, and in that case the Executive has to speak for the entire Nation.

There may be an occasion, for example, where a treaty was negotiated, as it was, with the Kingdom of Serbia in the 19th century to provide for extradition. The President of the executive branch in the 1950's interpreted that treaty as applying to the benefit of the Government of Yugoslavia.

Now, the Senate did not happen to object to that, but the subject of the extradition, Mr. Artucovic, objected quite sharply. But it was an interpretation made by the executive branch. I do not think that the Senate intended that the treaty with Serbia really apply to Yugoslavia, but the Executive Department has an obligation to interpret and an obligation to make its interpretation known to the Senate, as it has in this case.

Chairman **Biden**. Well, there is a difference between interpret and reinterpret. But I only have 10 minutes, so I will not stay in this area. Also, a thing called the Constitution intervened between Locke and your assertion.

But let me move on now to Professor Henkin.

Professor Henkin, God bless you, you are responsible for this document [indicating]. I am delighted I am no longer in law school. It is the "Restatement of the Law on Foreign Relations, Revised." Is that not correct?

Mr. **Henkin**. I am one of the persons responsible, yes, sir.

Chairman **Biden**. You were the "Chief Reporter," as I understand.

Mr. **Henkin**. Yes, that is correct.

Chairman **Biden**. Now, what is the relevance of the views expressed by individual Senators at the time the Senate provided its advice and consent to the ratification of a treaty?

Mr. **Henkin**. The views of individual Senators have to be considered in the context of the whole deliberative process of the Senate. The question is what was the understanding of the Senate, as a whole, in giving its consent.

It is difficult to disentangle the views of a particular Senator from a general Senate understanding. Often it is not possible to determine the understanding with certainty and clarity. But where several statements are made and there is general acceptance of their tenor, that is the Senate understanding. That is true in the case of Senate consent to a treaty, as it would be in the legislative history of a statute.

Chairman **Biden**. What about a circumstance where there is absolute unanimity among both the proponents of and the opponents of a treaty as to the meaning of specific provisions of the treaty and the statements are totally consistent through individual statements and colloquies between and among the Senate colleagues as to what the treaty meant? In that circumstance, is it necessary to have the Senate report or adopt formal reservations or formal understandings? Or can the totality of that consistent interpretation take on a similar, if not the same, weight?

Mr. **Henkin**. I do not think a formal reservation or understanding by the Senate is a constitutional requirement. The Constitution says nothing of the kind.

What the Constitution clearly implies is that what the Senate understands the treaty to mean is what the treaty means for purposes of its consent.

We have to distinguish, however, between an understanding in some essential respect and matters which are of little significance. The Senate may not have any understanding about some matter which the Senate does not consider important.

But as to matters that go to the essence of a treaty, as to those, the Senate understanding of what it is consenting to is binding on the President who makes it, and that is the only treaty the President can make.

Chairman **Biden**. Professor Tribe, is it fair to say that, while the President does have a certain authority to interpret treaties, at some point he crosses a constitutional line; a reinterpretation becomes an amendment or a new treaty?

So, is not the issue that really faces us this: can the President by calling an amendment to a treaty something else, namely a reinterpretation of the treaty, thereby escape the requirement of advice and consent of the Senate?

Mr. **Tribe**. Yes, Senator. I think that is one powerful way of putting the issue.

There is also the issue of process which I think is separate and equally important.

Chairman **Biden**. How do we assess the constitutionality of that substantive act? How do we distinguish genuine interpretation from an amendment or a new treaty?

Mr. **Tribe**. Well, Senator, if I could give you a 2-minute answer to that question, I would be "Mr. Magician." That is the fundamental question of all law: How does one tell whether an interpretation is simply a rewriting under another name?

Lewis Carroll had a theory, Humpty-Dumpty's notion, that a word is whatever I want it to mean. I must tell you, in all honesty, when I read the legal advisor's memorandum, I detected a little bit of Humpty-Dumpty about it.

Chairman **Biden**. Well, let me ask this in a slightly different way.

How much weight is accorded to the elements in the legislative history of the treaty, such as committee reports, floor statements, floor colloquies? Do these items reflect what a treaty means to the President and bind the President?

Mr. **Tribe**. I think they do, Senator, because, as with legislation, the aspects of the lawmaking process which are part of the constitutional structure identify and mark out the otherwise ambiguous terms of a text, whether it is a text of a statute or of a treaty.

I think a sharp distinction has to be drawn between important statements in floor debate and in the reports of the House and Senate, all of which are part of the legislative history, in a constitutional sense, and confidential, secret elements of negotiation or discussion.

Once you start down that road, there is no stopping. It might be interesting to know not only what the negotiators said across the table. It might be interesting to know what Richard Nixon and Henry Kissinger said to each other or what was said to the Politburo. But, surely, that cannot change the meaning of the treaty, whereas the things to which you refer are part and parcel of the meaning.

Chairman **Biden**. Do you agree with that, Professor Baldwin?

Mr. **Baldwin**. In some respects, I certainly do. I agree, I think we all three agree, that it is very dangerous if the Senate insists on having the whole negotiating history of every treaty that comes up. I don't think it could stand it, for one thing, and I think it would also be bad public policy for the general exchange of views. I think Senator Fulbright put it very, very well this morning.

Chairman **Biden**. Let me conclude, if I may trespass another 60 seconds on the time of my colleagues.

I am moving a resolution relating to this issue. Have any of you, or all of you, had a chance to examine it?

Mr. **Tribe**. I have read it, Senator.

Mr. **Henkin**. I saw it this morning, Senator.

Mr. **Baldwin**. I, too, saw it this morning.

Chairman **Biden**. Is this a constitutionally sound approach or does what I am attempting to do here have any constitutional flaw in it?

Mr. **Baldwin**. No. I think there is no constitutional difficulty if the Senate seeks to interpret a treaty in a different way than the President. I think it is really a question of wisdom.

I would rather see this issue addressed not in terms of "the law," because it will never go to any court. It is not the kind of thing we can adjudicate. But it is a question of wisdom, whether the State Department interpretation is the wisest public policy or that advanced by apparently the majority of this committee.

Chairman **Biden**. Senator—excuse me—I mean Professor Tribe? I don't think you would want the job.

Mr. **Tribe**. Oh, I don't know. [Laughter.]

Senator, I think it is entirely sound constitutionally. But I do want to say I do not think it is only a matter of public policy and wisdom. We are a nation of laws. The rule of law is under attack here. The treaty itself makes provision for renegotiation under Attachment D. The treaty itself makes provision for termination.

The question whether a President, who is unwilling to pursue the legally prescribed path of either renegotiation or termination, may, de facto, have his cake and eat it, too—purports to be following the treaty while performing radical surgery upon its face—is a fundamental question of constitutional law. And, especially if this matter does not go to a court, it is all the more important for the Senate—as an equal partner in the treatymaking process, and as a body of men and women who, every bit as much as the President and judges take oaths to uphold the Constitution—even more important for the Senate to express its sense in a resolution of the sort you have introduced—not its sense of where the best interests of the Nation lie. That is a different question. But I mean its sense of what the Constitution of our country requires.

Chairman BIDEN. Professor Henkin.

Mr. HENKIN. Senator, I do not see any constitutional difficulties with your resolution. What has not yet been said today is that the interpretation of a treaty is different from the interpretation of the Constitution or the interpretation of a statute. It is different in two senses.

One is that the role of the Senate, for constitutional purposes, is an essential condition of the ability of the President to make a treaty. Therefore, what the Senate does not consent to the President cannot make. The President at the time cannot make it; later Presidents cannot deviate from the treaty as the Senate understood it.

All are agreed that if the Senate makes its understanding explicit, that understanding is binding. But an understanding that is not made explicit may nevertheless be clear and is equally binding.

The second point is that the interpretation of any treaty, unlike an interpretation of the Constitution and unlike interpretation of a statute, is an international question. There are other parties to the treaty. There are principles of interpretation applicable to the construction of a treaty. The Vienna Convention on the Law of Treaties, which everybody has accepted as representing international law—as has the United States, as has the State Department—in article XXXI sets forth the general rules of interpretation for a treaty are. In some circumstances what a treaty would be held to mean internationally is not necessarily the same as what the Senate consented to. That may be. Therefore, talk about a "meeting of the minds" of the parties is beside the point.

The point is that, whatever an international body might make of it, for constitutional purposes, the Senate's clear understanding as to what a treaty means in an essential respect is constitutionally binding on all constitutional organs.

Chairman BIDEN. Thank you.

I apologize for going over my time.

Chairman PELL. Thank you.

Senator Helms.

Senator HELMS. Thank you, Mr. Chairman. This has certainly been an interesting day. We have heard all manner of opinions, and I guess it proves that opinions are like noses—everybody has one.

I particularly appreciate the three of you coming here today, even though I detect some difference.

On two times today I have been reminded of, I believe it was Samuel Johnston, who said if the law says that, the law is an idiot.

What we have here, in essence, is a question that I think goes beyond a lot of things that have been discussed, and that is the security of this country.

Senator Nunn, sitting right where Professor Baldwin is sitting now, acknowledged the wholesale violations of ABM and other treaties, and it seems to me that somewhere sprinkled into this discussion we ought to have some recognition that our freedom is under assault.

Now, I am not a lawyer. Some people in North Carolina think that is the only virtue I have.

I guess I want to ask what happens if there is a material change of conditions after a treaty is ratified by the parties to the treaty. I believe you attorneys, you legal scholars, call this rebus sic stantibus, is that right?

Mr. HENKIN. That's correct.

Senator HELMS. That was written down for me. I did not know that.

Have there been treaties in American history ratified and entered into force which subsequent administrations interpreted differently from the administration which originally had negotiated the treaty?

Mr. HENKIN. I do not know to whom that is addressed, Senator, but let me try my hand at it.

I do not pretend to know every treaty the United States has ever adhered to. But I am satisfied on the basis of my studies, though perhaps Professor Baldwin will correct me, that there is no case where this became the kind of issue that it has become here. In other words, I know of no case where a later interpretation was so radically different from what the Senate understood at the time it gave its consent.

To that extent, I think it is a case of first impression.

As to your basic point, Senator, I agree that treaties might be subject to the principle of rebus sic stantibus. I am impressed with your Latin, sir. That is a principle of international law. It is accepted by everybody that a fundamental change of circumstances would warrant a party to claim the right to get out of the treaty.

I should add, however, that while the principle is accepted, there has hardly been a case where both parties had agreed that there had been a change of circumstances and both were satisfied to have the treaty lapse.

I should say also, Senator, if we are talking about the security of the United States, I wonder whether this particular means is the way of addressing our security concerns; that is by trying to reinterpret the treaty in a way different from the way the Senate understood it and raising all of these constitutional issues. After all, there are, in a sense, three other possibilities. One is to claim the right to get out of the treaty on the principle of rebus sic stantibus, assuming—as I do not assume because I do not know—assuming that there has been that kind of fundamental change of circumstance. Second, if, as has been charged today, the Soviet Union has violated the treaty, if those violations are in essential respects, the United States can either suspend the treaty or even terminate it if the violation by the Soviet Union was of sufficient gravity. Third, and perhaps the easiest, since we have a 6-month clause in this particular treaty, we could give a 6-month notice and get out of the treaty that way.

Senator **Helms**. Excuse me, sir. Then there would be another select committee on both sides of the Congress condemning the President, bashing the President, saying that he is a warmonger and all the rest of it.

Mr. **Henkin**. Perhaps, sir, and so be it.

Senator **Helms**. No—not so be it. It is an absolute fact.

Mr. **Henkin**. That is the nature of our constitutional system, sir. The one thing a President cannot do is insist that we are bound by a treaty other than the one the Senate gave consent to.

Senator **Helms**. Well, of course, there, again, we go with opinions and the noses.

I say to you that there have been a number of treaties where the administration has interpreted them differently down the line, and I did not hear any hue and cry about it.

The Rio Treaty, is an example, as is SEATO, and the original 1903 Panama Treaty. At those times, when the later administration changed its position, where was the indignation? Where was all the constitutional questioning? We did not hear it.

It is when this President, in an effort to try to protect the liberties and the freedoms of the American people wants to try to deal with the Soviet Union, which is engaged in wholesale violations of the treaty, that is when we have all of the scholarly stuff up here attacking the President.

Now, can the Congress, by legislation—let me get back to the Constitution as you see it and as I see it, frankly—can the Congress, by legislation, not by treaty, change the effects of a treaty that has been ratified and enforced?

Mr. **Henkin**. Yes, sir. It is accepted constitutional law in the United States that Congress can, by a later statute, "repeal"—and I use that word in quotations—"repeal" the effect of a treaty as domestic law. We did that beginning at least with the Chinese exclusion policy, the statute and the treaty, more than 100 years ago.

Senator **Helms**. All right.

Now, have the courts ever relied on the subsequent conduct of the parties as evidence of their intent in treaties?

Mr. **Henkin**. Yes.

Senator **Helms**. Professor Baldwin, I see you nodding.

Mr. **Baldwin**. Yes, I believe that is what the courts have considered.

Senator **Helms**. I think that is correct.

Mr. **Henkin**. Senator, if you will look at the Vienna Convention—it is not controversial; it is something which the United States, including the State Department, has accepted—you will see that there is a general rule of interpretation. It sets forth the factors that can be considered.

If you like, we can make that article part of the record, and I think it will show exactly what we have in mind.

Senator **Helms**. I think we should.

We are operating under some time constraints, but I expect that Senator Biden will give me 2 or 3 more minutes.

Chairman **Biden**. Sure, go ahead.

Mr. HENKIN. Well, I am willing to read it, but if you like, I can put it into the record. It is not very long.

"Article 31. General Rule of Interpretation:

One, a treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Two, the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(*b*) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty;

(3)—and this is the point I think you had in mind, sir—there shall be taken into account, together with the context,

(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) any relevant rules of international law applicable in the relations between the parties.

(4) A special meaning shall be given to a term if it is established that the parties so intended.

I am through reading. I had in mind, in particular (3)(b), which speaks of taking into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

Senator HELMS. Well, I know you read it correctly, but I must point out, sir, that the United States has not accepted the Vienna Convention. It has not ratified it. True enough, the State Department uses it, but that is just one of the few things we could criticize the State Department about.

So that is a non sequitur almost, I believe. But I think it ought to be made a part of the record.

I do not know how much more time I have.

Chairman PELL. Excuse me, but what should be part of the record. The citation?

Senator HELMS. Did you read it in its entirety?

Mr. HENKIN. Yes. I was reading article XXXI of the Vienna Convention on the Law of Treaties.

Senator HELMS. It is already in the record, then.

I had laid before me a quote from a textbook by two Harvard University international legal scholars, Henry Steiner and Detlev Vagts. Are you familiar with them?

Mr. TRIBE. Yes, Senator.

Senator HELMS. They say that the long-term treaty must benefit from a certain flexibility and room for development if it is to survive changes in circumstances and relations between the parties.

Do you agree with that?

Mr. TRIBE. Very much so, Senator. That is why I believe the ABM Treaty was not written—and I read now from article II—so as to be limited to the three currently consisting devices, but, rather, written in a functional manner to deal, and I now quote from article V, "with ABM systems or components which are sea-based, air-based, space-based, or mobile land-based." That is, the treaty was flexible. It was designed to encompass future technology. That is the reason that some Senators, two, in particular, voted against it.

So I agree with my colleagues. This treaty I think reflects the need for flexibility, rather than a desire to freeze with respect to the 1972 technology.

Senator **Helms**. Mr. Chairman, let me just say in conclusion—and I would emphasize my appreciation to all three witnesses for coming. I did not want to appear adversarial, even though this whole situation bothers me because this is a crucial time in the history of this country and perhaps in the survival of it.

If we do not give this President some flexibility in trying to work out the problem of the enormous number of Soviet violations, then if we hang it up on differing legal, constitutional interpretations, then we may do severe injury to this country.

Nobody respects and loves the Constitution more than I. But we had one man here today who says he thinks the President of the United States be elected by the people, that he ought to be selected by the legislature, by the Congress. Obviously, he did not watch how the House of Representatives dealt with the pay raise issue.

In any case, Mr. Chairman, I thank you very much and I thank you gentlemen.

Chairman **Pell**. Thank you very much, Senator Helms.

I have two specific questions, if I may.

First, I would say that the answer to Senator Helms' question earlier as to what precedents there are for the United States reinterpreting treaties at a later date, we have, I think, a good many examples in the treaties with my own Indian forebears, where they were treated pretty roughly and the treaties were reinterpreted afterward.

Now, my two specific questions are these.

First, the suggestion has been made that the negotiating record should be released. I am wondering what your view is on that.

I would be concerned that it would set a precedent which would inhibit negotiations in the future with other countries.

Do you see any harm in of releasing the negotiating record, or do you think it should be kept secret?

Mr. **Baldwin**. I see a great deal of harm in the long run, Senator. If the executive branch must disclose the text of all the negotiations, I think this would very much inhibit not only our own people, but foreign diplomats as well. It would also overwhelm the Senate with paper.

Chairman **Pell**. I am inclined to agree.

Would the two of you agree with that? Just yes or no.

Mr. **Tribe**. I tend to agree, Senator.

Mr. **Henkin**. I tend to agree. I believe in open treaties secretly arrived at.

Chairman **Pell**. Exactly. That is real diplomacy. You always let the other man have your way.

I have another question, and this is a thesis that I wrote up in a book some years ago.

I could not recall any case in history where a nation has honored a treaty where, by breaking it, it would be to its advantage. I am wondering if anybody here can think of an exception to that rule. In other words, if you break a treaty, there are sanctions. That is what keeps people honoring a treaty—or there are benefits to the country involved and that keeps them honoring it.

Can you think of a case where a country has kept to a treaty which violated its national interest just because they had signed the treaty?

Mr. HENKIN. Senator, I think it is hard to give examples because there will be differences of interpretation.

Chairman PELL. Well, just give me one or two.

Mr. HENKIN. Let me address the main point, if I may, Senator.

The national interest is one of those strange concepts, commonly misunderstood. In general, I think it is in the national interest to observe one's treaties, and, therefore, it is hard to talk about violating a treaty because of one's national interest.

What a country does when it violates a treaty is to choose one kind of national interest over another. It is, therefore, very difficult to find situations where the choice you describe at appears on the record.

What is clear is that states often continue to observe treaties which might not be in their interest by some objective standard, but no one makes any fuss or record about it, so it is very hard to prove. No one goes around saying I really would like to break this treaty but I a not going to. That is not the way governments behave.

Chairman PELL. Professor Tribe, I really would appreciate a short answer showing me where I am wrong.

Mr. TRIBE. My shortest answer is that I think Professor Henkin's description is something that I cannot improve on.

Mr. BALDWIN. He is right. Treaties are not suicide pacts.

Chairman PELL. In other words, then, you would find it difficult to give an example where a treaty has been honored by a country to its disadvantage. That would be correct?

Mr. BALDWIN. Well, I think sometimes one does not like to honor one's obligation or pay one's debts. But in the long term, I think Professor Henkin is quite right. You honor your pacts.

Chairman PELL. That is when you get a good international lawyer working for you.

Thank you.

I will turn the hearing over now to Senator Specter, because I have to go to another meeting.

Would you please wrap this up?

Senator SPECTER. Thank you very much, Senator Pell. I am delighted to be promoted to both chairman of Foreign Relations and chairman of Judiciary at the same time. That is probably the most remarkable promotion in history.

Chairman PELL. Right. Go ahead.

Senator SPECTER [presiding]. I would like to pursue a couple of lines of questioning, following up what Senator Pell had asked about making the record public.

Let me start with you, Professor Tribe, since you only tend to agree.

Do you have some reservation about that conclusion?

Mr. **Tribe**. My reservation, Senator Specter, arises from the practical considerations that were involved in Senator Nunn's testimony and his colloquy with you; that is, when there have been selective invocations of the negotiating history in order to create an apparent ambiguity, and when there have repeatedly been references to that history, it is a little bit like unringing the bell or putting the cat back into the bag. I am not sure what the best metaphor is. It is very hard to keep half your mind shut.

So, it seems to me that, once one has gone a good distance down that road in a particular case, perhaps uncovering the whole history is a good bit better than uncovering selective and often self-interestedly chosen portions of that history.

Senator **Specter**. Professor Henkin, do I see you nodding in agreement with that approach?

Mr. **Henkin**. I think so. In general, that is true.

I would like to remind us that the Constitution recognized secrecy. The word "secret 'is in the Constitution, when it authorized the Congress, for example, to keep a journal, except when it wished to keep certain matters secret.

We are not committed to putting on the public record everything we know. But there come times when everything should be made public. There may also be times when there are special reasons for making something public early.

But, in principle, the notion that we must do everything in a glass bowl is mistaken. It is not the best way to run a democratic government.

Senator **Specter**. But once a substantial part or once there have been some disclosures, as Professor Tribe has commented, would you think then that a full disclosure would be appropriate?

Mr. **Henkin**. It might be appropriate, depending on the circumstances and on the costs. If we decided it is in the U.S. interest, because of domestic political considerations, to reveal more of the record, I think we ought to consider whether we could get the agreement of the other side or otherwise mitigate the possible disadvantages of doing it.

Senator **Specter**. Professor Tribe, do you think that enough of this negotiating record has been disclosed so that you cannot unring the bell and you ought to go ahead and ring it?

Mr. **Tribe**. I am not confident about that, Senator. But I am confident about one aspect of it, and that is there is, I think, a terribly great danger that so much will be made to turn in this committee's deliberations and in the press on the supposedly climactic event of pulling back the curtains and revealing the history, that one might forget fundamentals. The most important of those fundamentals is that those secret negotiations were not a part of what was presented to the Senate. They were not a part of the treaty that was made with the advice and consent of the Senate.

So, to build up to the great climax of releasing this information ought not to mislead anyone into thinking that that is the "piece de resistance," and that that will have all the answers.

The answers, I believe, are contained in the public record.

Senator SPECTER. I understand your point on that. But if the negotiating record is relevant to our ultimate conclusion, albeit subordinate or only a part of it, then the issue arises as to how we treat that.

But assume that we do have enough sense to not regard it as overwhelming, as a great climax. Then, on this state of the record, you have been here all day, faithfully listening to these proceedings. You have followed it in the press. You have seen the constant references to the negotiating record. Do you think enough has been disclosed that it all ought to be disclosed?

Mr. TRIBE. I guess I do not regard my constitutional expertise as relevant to that, Senator. I do not know. I am not trying to be evasive. But I think that is a question of wisdom for this committee. It is not one on which I have a strong opinion.

Senator SPECTER. Well, what I am grappling with, as an individual Senator, is whether there are strong public policy reasons not to have the disclosure. The one which I know about is that it might have a chilling effect on other negotiators, not to inhibit negotiations, and, principally when negotiators take a position that they may want to retreat from, that they should feel free to do so without someone looking at the record later and saying he was soft on this point, or he did the wrong thing here.

That is a factor.

You men are experts in this area of the law, on treaties. What is the history on the subject. Have negotiating records been disclosed in the past?

Mr. TRIBE. There certainly have been instances in which they have been disclosed, and others in which there have been leaks, and yet others in which Presidents as venerable as George Washington have declined to disclose.

There is no consistent history.

Senator SPECTER. Can you give me an illustration or two of where negotiating records have been disclosed?

Mr. TRIBE. I cannot recall ones that would be helpful to the committee at the moment.

Senator SPECTER. Can you, Professor Baldwin?

Mr. BALDWIN. I suppose most of the negotiating history of the Versailles Treaty has now been pretty well exposed.

Senator SPECTER. Which one is that?

Mr. BALDWIN. The Versailles Treaty, to which the Senate did not give its advice and consent. Doubtless it would not have been as close a vote if the negotiating history had been available.

I share Professor Tribe's feeling that the reference to the negotiating history is, in a sense, a red herring. It is my position that the issues are not so much legal, but how the treaty should be interpreted in 1987, in the light of national interest, what the treaty says, and, of course, what the Russians do.

It is possible for an interpretation made by the United States to be responsive to what Russian policy is now. Conditions have changed.

Senator SPECTER. Well, if you take that approach, that gives the United States the full policy range to exercise its right to withdraw from the treaty with 6 months' notice. We have the full range of opportunities, if you regard it as simply a question of what is in our public interest.

Mr. BALDWIN. That is the whole range; yes.

Senator SPECTER. But we have to deal with this negotiating record issue. We have to come to grips with how we are going to handle it. It does seem to be a relevant consideration. We have wasted an awful lot of time on it today, and the question is how are we going to handle it.

I do not sense a great concern on the part of the three of you that it will be cataclysmic for the future of the negotiation of treaties if this negotiating record is released, that it is going to have a devastatingly chilling effect.

Professor Henkin.

Mr. HENKIN. Senator, it is important to keep in mind the time factor. All negotiating records become public at some stage. Usually there is a 50- or 60-year time gap. The longer you wait, obviously, the less damage there will be to any kind of interest.

I do not think anybody worries about the effect on diplomatic negotiations of now revealing everything that happened in negotiating the Jay Treaty, to take the extreme example.

So the question really is when to release records of negotiations.

Mr. Tribe's point of a minute ago is important. If it is decided to disclose the record of the negotiating history, it ought to be recognized, (*a*) what the costs might be, and (*b*) what the purposes are. The purpose, as Mr. Tribe said, cannot be to affect the meaning the Senate gave it. That cannot be affected by anything which was not brought to their attention.

There may be other reasons of domestic politics—and I do not use that phrase in any derogatory sense—of confidence building, et cetera. But one ought to make the judgment with due account to the time that has elapsed, the costs, and the reasons for doing it. You cannot generalize about that.

Senator SPECTER. Well, if you cannot generalize on it, then it is a policy consideration that we should feel free to make if we conclude that 15 years having elapsed and the issue being before the Senate and a great deal of concern being expressed about it and the public interest involved—if it is discretionary, then I do not have any problem with it. I would release it in the interest of public disclosure.

Mr. HENKIN. Well, when you say it is discretionary, you mean it is in the discretion of the administration, or of the U.S. Government as a whole to release it at any time. There is no constitutional or legal obstacle, Senator. But the discretion has to be used wisely, and whether it is wise is something about which you and the administration will have to wrestle in your consciences.

Senator SPECTER. Well, suppose you were a U.S. Senator. Would you vote to have it released?

Mr. HENKIN. I am worse off than Larry Tribe because I do not know enough about what is in the materials to make a judgment. I would like to know what they say.

Senator SPECTER. Well, you will know if we release them.

Mr. HENKIN. But I would like to know before I release them. You, Senator, can probably get access to them and see.

Senator SPECTER. Well, I have had access to them and I have seen them. That is an important factor in my feel of it, obviously. Professor Tribe.

Mr. TRIBE. Senator, it seems to me that it might be useful to make this distinction.

There are a great many things that are confidential, but potentially relevant to an important decision. The conversations in the Oval Office, confidential under a presumptive Executive privilege, ultimately were released under a court order in the case of the *United States* versus *Nixon*.

I think it is very important to decide before one makes the judgment about releasing whether even the marginal cost is worth the benefit, whether it is worth the candle.

I think in making that decision, it is important to recognize that there is a fundamental difference between an ambiguity as to a technical term—what did they mean, let's say, by "interceptor missiles"—and it might be that some important otherwise ambiguous detail can be brought to the surface only by compromising confidentiality and looking at the record, without really altering the meaning of what the Senate voted on.

Quite a different picture is presented, based on what I have heard here today and what I have read about the situation, when the question of the fundamental thrust and meaning of the entire treaty, as applied to future technologies, is at stake. As to that question, I am absolutely convinced that the details of the negotiating record will be more distracting than illuminating, whatever they show. I am convinced that if they tend to support the restrictive view, they will be paraded as decisive evidence for the restrictive view. If they tend to support the broad view, they will be paraded that way.

I think both sides will be wrong, because I think it is more important for the constitutional structure that we focus on the Senate's role in the ratification process. So, if for public relations reasons one does decide that, even though the material is not relevant, enough time has passed to release it, one should not fool oneself about the nature of the use that would be made of that information.

Senator SPECTER. But assuming that we can make the appropriate use of the information and that we are not inappropriately distracted and it is relevant—then what?

Mr. TRIBE. If you make all those assumptions, the question goes away, Senator.

Senator SPECTER. Where does it go?

Mr. TRIBE. If you assume that no one will abuse or misunderstand the information, and that it is relevant and necessary and that the benefits of releasing it outweigh the costs, you would have to be crazy not to release it. But I do not make those assumptions.

Senator SPECTER. It is relevant, is it not? All of the standard doctrine says that the negotiating record is relevant. Or are you suggesting that it goes to such a fundamental issue that it is not relevant?

Mr. TRIBE. I am suggesting, Senator, that here it goes to such a fundamental issue that it is not relevant.

I do want to add that, powerful as the Senate may be, it cannot control what use, misuse, or misunderstanding the media and others might make of this information.

Senator SPECTER. Oh, no doubt about that.

Professor Baldwin, you have the last word.

Mr. BALDWIN. I have one final comment.

If the Senate makes it a practice to require the submission of the negotiating history, there is a risk of confrontation with the executive branch. An article that I wrote a few years ago, "The Foreign Affairs Advice Privilege," addresses the problem of a confrontation between the Senate and the Executive with respect to the submission of documents.

[The article referred to appears in the appendix.]

Mr. BALDWIN. I think it is very unfortunate when the Executive and the Senate come into confrontation. It presents constitutional issues that perhaps we would just as soon were never answered. What we require out of the Constitution, it seems to me, is a continuing process of negotiation, compromise, conciliation, and forebearance. That, it seems to me, is the objective to which this committee should devote itself.

Senator SPECTER. Professor Henkin, you will have the last word.

Mr. HENKIN. Thank you. I raised my hand and asked for the last word on a very small point in response to something that Senator Helms said. I would appreciate it if it were entered into the record at the appropriate point.

I think Senator Helms might be understood as casting aspersions on the Vienna Convention on the Law of Treaties because the Senate has not yet given consent to its ratification.

I wanted to say, for the record, that the Vienna Convention on the Law of Treaties is not controversial, certainly not controversial on the subject we are addressing today; that its content is accepted as customary law; that the restatement has built its entire treatment of the law of treaties on that convention. Therefore, I do not want anybody leaving these hearings to think that there is something wrong with the Vienna Convention.

Thank you for your courtesy.

Senator SPECTER. Well, I do not know whether Senator Helms would disagree with that or not. But since he is not here, he will have to await some other occasion to comment on it.

Gentlemen, thank you very much for joining us.

I am told that Senator Biden has a few more questions and he will be coming back to preside.

Chairman BIDEN [presiding]. I am back.

Gentlemen, I notice you were all moving your chairs back quickly. You remind me of students in your classes. You know that old rule, that you only have to wait 10 minutes for an associate and 20 minutes for a full professor. Well, I want you to know that you only had to wait 30 seconds for me.

Professor Tribe, the letter that Senator Dole sent to the President says, "The prestigious American Law Institute, in the most recent edition of its authoritative "Restatement of the Law on Foreign Relations of the United States" reaffirms this proposition in a black letter declaration. And the proposition he is referring to is as follows: "As you know, there are no legal bases for such a claim.

Constitutional law is absolutely clear on the point. The views of the Senate on interpretation of a treaty are legally irrelevant and in no way bind the President unless those views are expressed (1) formally and (2) at the time of the Senate's decisions of advice and consent."

It seems to me—and I have the man sitting to your left to whom I also want to ask the question—that I am not sure he understands the "Restatement of the Law on Foreign Relations of the United States" as I understand it.

Let me read the letter one more time and ask you all to comment. I might as well read the whole letter. It says:

> Mr. President, I want to reaffirm my strong support for aggressive research and development of the Strategic Defense Initiative, SDI in the context of our continued adherence to the Anti-ballistic Missile Treaty. In recent weeks, new attention has focused on the question of the interpretation of that treaty. One Democratic Senator has claimed that any treaty interpretation contrary to the views expressed by individual Senators at the time the Senate provided advice and consent to ratification of the treaty could spark a constitutional confrontation of profound proportions.
>
> As you know, there is no legal basis to such a claim. Constitutional law is absolutely clear on the point. The views of the Senate on the interpretation of a treaty are legally irrelevant and in no way binding on the President unless those views were expressed (1) formally, and (2) at the time of the Senate's decision to advise and consent.
>
> The prestigious American Law Institute. in the most recent edition of its authoritative "Restatement of the Law on Foreign Relations of the United States," reaffirmed this proposition in a black letter declaration.
>
> Moreover, in its decision in the case of Fourteen Diamond Rings versus the United States, the Supreme Court specifically ignored a formal expression of the Senate's interpretation of a Customs Agreement with the Philippines on the grounds that the interpretation was expressed well after the act of advice and consent.
>
> Since the Senate as a whole, at the time it provided advice and consent to ratification of the ABM Treaty, took no formal position on the meaning of Articles II and IV and Agreed Statement D, as they relate to contemporary research and development of SDI, any views expressed informally by individual Senators at the time or since do not legally bind you.
>
> As a practical matter, of course, it is both proper and prudent that you consult closely with the Congress,"

Et cetera.

I would like you, Professor Tribe, to comment on that characterization, if you would, on the "Restatement of the Law on Foreign Relations' and, most specifically, on whether or not the consistent, although not formally drafted, assertions on the part of every Member of the Senate who spoke to the issue, both for and against the treaty, on the meaning of article II, article V and Agreed Statement D, whether or not they constitute something that the President must pay attention to, notwithstanding the fact that they do not take the form of a formal amendment, resolution, or understanding attached to the treaty.

Mr. **Tribe**. Senator, I think that Senator Dole has misread the relevant Restatement of the law, has misunderstood the *Fourteen Diamond Rings* decision, and has made an argument that ultimately undermines the very position that he has taken.

I think he misunderstands the Restatement in this respect, although here I should defer to its principal reporter, who I think will have something to say when I am done.

With respect to the Restatement, the proposition that Senator Dole seems to think it establishes is a far more formalistic proposition than anything that the American Law Institute has ever endorsed. If one reads the Restatement in its context, it makes absolutely clear that contemporaneous practice and the kind of unanimous agreement to which you refer is, indeed, legally relevant and may be legally binding, even if not expressed in any form as a reservation or a specific resolution.

Perhaps equally important, as far as the *Fourteen Diamond Rings* decision is concerned, it establishes only a very narrow proposition, and that is that if a subsequent Senate passes a resolution as to the meaning of a treaty, as the Senate now might consider doing, that resolution is in no way binding on a court. The court would have to decide for itself what the treaty meant.

Chairman BIDEN. And would the court look at what the Senate at the time the treaty was ratified said?

Mr. TRIBE. Absolutely.

That is really the point of the *Fourteen Diamond Rings* decision itself, which is why I said Senator Dole is undermining himself. The reason that a resolution of a subsequent Senate is not legally relevant to the meaning of a treaty is precisely that the only thing legally relevant is what the Senate that gave its consent had before it, which did not include the subsequent resolution.

Once one recognizes that, then the attempt to reach into the record and to dredge out a revisionist secret history becomes dramatically irrelevant. So the *Fourteen Diamong Rings* case is strong authority against the position taken by Senator Dole, by the legal advisor, and by this administration.

Chairman BIDEN. Professor Henkin.

Mr. HENKIN. Yes, Senator. I agree with Professor Tribe's answer.

There is nothing in the restatement about disregarding the interpretation of the Senate made contemporaneously with its consent. One must not confuse the interpretation by the Senate when it gives consent with an attempt by a later Senate to interpret the treaty otherwise.

Chairman BIDEN. And that is what the *Fourteen Diamond Rings* case was about.

Mr. HENKIN. That is what the *Fourteen Diamond Rings* case was about, sir. That is relevant to the question you asked us earlier about your resolution.

Even in your resolution one should distinguish the present Senate's insistence on sticking to what the previous Senate understood the treaty to mean at the time it gave its consent from what the Senate might now think the treaty ought to mean.

Chairman BIDEN. That is a very important point.

My resolution says we must be bound by what the Senate in 1972 meant, not we should be bound by what the Senate of the One Hundredth Congress means.

Mr. HENKIN. That is right, sir.

On that point, I would address something that was said earlier in these hearings, which perhaps does not come through as clearly as it might.

It is often possible to interpret a treaty differently from what was originally intended. Whether such new interpretation is valid may depend on just how different the new interpretation is from the original intent, how important is the particular matter under consideration.

It was asked earlier today whether the United States has ever interpreted a treaty differently from the way it was originally conceived. It certainly is possible that it has. One would have to search the record.

But we do not have a case where that constitutional question was in issue, where a President later sought to deviate from what was clearly the intention of the Senate at the time it gave its consent.

When the President does that, if it is a significant matter and the interpretation is significantly different, he may be in the realm of making a new agreement by interpretation.

Even then, if the President and the Senate both agree to have a new agreement by interpretation, they can do it. A later Senate might say that a new interpretation is sufficiently different from what the treaty meant at the time it was consented to, and that the new interpretation should go to the Senate now for a new consent.

I think, as Professor Baldwin said, you may have to draw a line between one kind of interpretation and another. But, in principle, the Senate today is itself bound by what the Senate previously consented to. That is what that treaty means, unless there is to be a new agreement.

Chairman BIDEN. Professor Baldwin.

Mr. BALDWIN. I guess I just have a couple of qualifying footnotes and they may be fairly minor.

But it seems to me that the contemporaneous views of the hundred or so Senators who make speeches must be considered by a subsequent treaty interpretor. When we look at the 14th amendment, we look at the debates and the views of particular Senators, and we do consider them. They have each some relevance.

Chairman BIDEN. Isn't there more relevance if there is absolute uniformity among all those who spoke, both for or against the amendment and/or the treaty?

Mr. BALDWIN. Unquestionably.

Chairman BIDEN. Which is the case here?

Mr. BALDWIN. I do not deny that.

I think the question is, is it dispositive.

It is my position that any treaty must be interpreted not simply in the light of what the Framers particularly intended in 1789 or 1783 or 1972, but in the light of our whole experience.

Chairman BIDEN. You will never get appointed a judge in this administration.

Mr. BALDWIN. Well, I am not looking for the job, thank goodness. [Laughter.]

Also, subsequent interpretations may have legal relevance insofar as they represent state practice, which is, of course, relevant under the Vienna Convention.

Chairman BIDEN. I thank you all.

Let me just say to you that as I, with the help of some very good staff, have spent a great deal of time going through this, there are several points that I would like to make as we conclude this stage of the hearings.

One is that everyone in the Senate at the time—everyone—had the same view of the provisions of the treaty and particularly those in controversy that are being reinterpreted: article II of the treaty, and what "currently" meant; and article V of the treaty, which concerns what systems could not be developed and, implicitly, which ones could; and Agreed Interpretation D. Everyone was in agreement as to their meaning. That is No. 1.

No. 2, there was no one—no one—who sought and/or was given access to the documents that now are being referred to, the negotiating record.

No. 3, the Soviet Union and the United States, up until some months ago agreed, as a matter of practice, as to what it all meant. Nobody disagreed until this administration said, by the way, we are changing our mind. Even this administration until October 1985, had signed on to the interpretation that all the Senators thought existed in 1972.

No. 4, no one can deny this treaty was designed to prevent the defense of territory, the totality of American soil and Soviet soil from nuclear attack. That is why it was called the ABM Treaty.

The President has expressly stated the object of SDI, which is the reason why he wants a reinterpretation, is specifically to erect an astrodome over the United States of America. That is what he says he wants to do.

This treaty was entered into for the express purpose of not having that happen.

No. 5, I find that, unless you can get by the intent of the Senators at the time, as expressed on the floor, and find an overwhelming ambiguity in the wording of the treaty that either has been exposed as a consequence of debate on the Senate floor, interpretations by the parties to the treaty subsequent to its signing, or as a consequence of some action taken by either party, then I don't know how you even warrant getting to the negotiating record, which was never made available to the U.S. Senate.

None of those circumstances in this Senator's opinion exists.

I believe that if the President persists in effectively abrogating the treaty by the method he has employed, he will provoke a constitutional crisis and he will, in fact, damn future Presidents who attempt at future dates to reach reasonable agreements and accords with foreign powers because no Senate, if this is allowed to happen, will trust any future President to the effect that what is being expressed to them as the intention of the administration and the four corners of the agreement is, in fact, the agreement.

As one of you said, future negotiations will fall of their own weight. The process is complicated enough as it is now.

The last thing I would say before I bid you all a good day is that I believe that this is an unwarranted provocation. The President has the authority by other means to get out from under this treaty if he wishes to do it. He need not come up with a phony construct which flies in the face of constitutional interpretation and good faith on the part of an administration dealing with the Senate.

I agree with Senator Nunn that the Soviets have, in fact, violated the treaty. Unlike my colleague from North Carolina, who talks about wholesale violations, I say there are not any wholesale violations. There is one and it has been raised. But it is a violation: The

Knasnoyarsk radar that exists not on the border where it should be, but inland, to put it in layman's terms. That is a violation of the treaty.

The President, if he wants to conclude that this jeopardizes the supreme national interests of the United States, can make that argument. I believe it does not. I believe there should be a proportional response. But he could do so.

There is a provision of the treaty where he can give 6 months' notice. Since it is not possible for the President to get his SDI program underway within 6 months anyway, why do this? I wish Senator Helms were here. He said the reason he is doing this—and I read it almost as an admission—the reason why this is being done is so that the President would not be accused of being a warmonger.

Well, folks, Joe Biden is accused of being certain things; the Senators are, the Senate is, and the President is. It is the nature of the American political system. The President, though, is bound by the Constitution. And it is this Senator's intention to do all that is in his power to keep the President bound by the Constitution.

He can make a security judgment for this country, saying that the treaty is no longer in our interest and move to get out of the treaty under the treaty provisions. But, as far as I am concerned, what he is attempting to do is totally inappropriate.

I thank you all for coming. I thank the staff for a very good job in preparing all of us on both sides of this issue.

This hearing is now adjourned.

Thank you.

[Whereupon, at 5:00 p.m., the committees were adjourned.]

THE ABM TREATY AND THE CONSTITUTION

THURSDAY, MARCH 26, 1987

U.S. Senate,
Committee on Foreign Relations,
and
Committee on the Judiciary,
Washington, DC.

The committees met at 10:00 a.m., in room SD-419, Dirksen Senate Office Building, Hon. Claiborne Pell (chairman of the Committee on Foreign Relations) and Hon. Joseph Biden (chairman of the Committee on the Judiciary) jointly presiding.

Present: From the Committee on Foreign Relations: Senators Pell, Dodd, Kerry, Helms, Pressler, Murkowski, and McConnell; from the Committee on the Judiciary: Senators Biden, Kennedy, Leahy, Thurmond, Specter, and Humphrey.

Chairman Pell. The Committee on Foreign Relations will come to order.

I am very glad to know that we will have as our first witness, Senator Hollings, who then will be followed by witnesses from the administration and from the previous negotiating team.

This is the second joint committee hearing on the ABM Treaty, and I congratulate Senator Biden for his initiative both in seeking these hearings and in offering Senate Resolution 167, of which I am glad to be a cosponsor.

This resolution would have the Senate make the judgment that "the development, testing, or deployment of any sea-based, air-based, space-based, and mobile land-based ABM systems or components for the purpose of countering strategic ballistic missiles or their elements in flight trajectory, including ABM systems and components involving technologies not in existence when the treaty was ratified, would be inconsistent with the provisions of the treaty and would require an amendment to the treaty."

The resolution further declares that such an amendment would require agreement of the parties and advice and consent of the Senate.

The administration has asserted that, regardless of what the Senate may have understood the limitations and obligations of the United States to be under the treaty, it has the legal right to follow a broad interpretation which follows the development and testing of space weapons.

I find this notion particularly astonishing in view of the administration's position on a reservation to two testing treaties. In that case, when the administration wanted to change the obligations of the parties, it wanted the Senate to instruct it to negotiate new obligations, watch while it was doing so, and then pass judgment whether it had done so properly. By contrast, on a matter of central importance to our national security, the administration has felt free to change the obligations understood by the Senate when it gave advice and consent—thus demonstrating a certain cavalier disregard for the constitutional responsibilities of the two branches of Government.

I would add here that this is not a meeting just of the Foreign Relations Committee. Much more importantly, it is a joint meeting of the Judiciary and the Foreign Relations Committees, and the chairman of the Judiciary Committee, Senator Biden, will be with us shortly.

We will hear now from our initial witness, the Senator from South Carolina.

But first, the Senator from Pennsylvania would like to make an opening statement.

Senator SPECTER. There are a few comments I would like to make. Thank you, Mr. Chairman.

I shall not be long.

While technical legal considerations are important, I would like to make an observation or two about some of the broader matters which I think are the backdrop on our consideration of the ABM Treaty, and I do not place lightly the emphasis on legal matters, having spent a lifetime with the law myself.

I think we have to view the ABM Treaty in the context of its impact on arms control because that is the ultimate objective.

Earlier this month, I was part of a seven Senator team viewing the arms negotiations at Geneva, and there are very serious implications on this debate as to how it will impact on our negotiators. I think that is a very important matter to be taken into consideration.

I think we also have to consider the impact of the broad versus narrow interpretation on certain issues of national security and the specific tests which may have to be conducted on the strategic defense initiative.

It may be that broad versus narrow debate is not determinative. It may even turn out to be not relevant. It may be that the tests could be conducted within a narrow interpretation. But those, I would submit, are important factors that we ought to keep our eye on beyond the narrow legal questions.

I think it is crucial that we not put those important national and international interests in a straitjacket and that it is not an answer to say that we can withdraw from the treaty because there are very heavy political costs if we should chose that alternative, and that is an alternative that I would be very reluctant to see the United States undertake.

While these hearings are in process, many of the Senators are coming to their own conclusions on what the ABM Treaty means on narrow versus broad, and I would express the caution against rushing to judgment.

The negotiating record is still secret. We had hearings earlier this month and our examination of the witnesses was very definitely limited by the fact that we could not go into the airgrams which are part of secret negotiations. The prior practices between the

United States and the Soviet Union are a vital matter on the interpretation of this treaty, and the record is far from complete there.

When Senator Nunn issued his second paper on the matter, he noted, I think, some important reservations appearing at page 2 of his second statement, that the record of United States and Soviet subsequent practices now available to the Senate is far from comprehensive. Senator Nunn then goes on to list some items where there has not been access.

One of the items where there has not been access has been the work of the Standing Consultative Commission. I am informed that some of the activities there in 1978 have a very vital impact on what this treaty means, understood by the United States and the Soviet Union. I think it is very important to focus on the fact that the meaning of the treaty is the meeting of the minds between the United States and the Soviet Union, as contrasted with the Senate's view.

I believe that the Senate has a critical and vital role, but in the ultimate analysis, it is what the United States and the Soviet Union understand the ABM Treaty to mean. And those records in 1978 on the Standing Consultative Commission have not yet been made public. I think they will ultimately have a tremendous bearing on this issue.

Ultimately, at the talks in Geneva, our negotiators are going to have to look the Soviets in the eye and come to terms with what the real understandings are and where we go from here. So I am hopeful that, with the importance of these issues, we will focus on this broad range of questions and not rush to judgment because of the very vital interests which are at stake here.

Thank you, Mr. Chairman.

Chairman Pell. Thank you very much, Senator Specter.

Senator Hollings, we have your statement here, which will be inserted in full into the record, as if read.

STATEMENT OF HON. ERNEST F. HOLLINGS, A U.S. SENATOR FROM SOUTH CAROLINA

Senator Hollings. I appreciate that, Mr. Chairman. That will save us both a good bit of time, and you have the more important witnesses to hear.

I thank you, on behalf of our Foreign Relations Committee and Senator Biden, on behalf of the Judiciary Committee, and Senator Specter and others for this courtesy to briefly state that I am not here to rush to judgment.

I agree with Senator Specter. In fact, if you look at the hours and hours that you have to go over the actual negotiations record, you sort of are taken aback when you hear talk about rushing to judgment.

But the distinguished Senator is correct. Many are rushing to judgment, shouting "constitutional crisis," trying unilaterally to rewrite a treaty that Senator Pell and I both voted for.

I would like to bring a perspective to it from the standpoint of really what is at issue.

For one, I am not for the deployment immediately of the strategic defense initiative. General Abrahamson only testified a couple of days ago before the Senate that we are not prepared to make that decision. It would be 5 to 7 years out. And everyone is in a panic that the decision about the treaty itself, in a sense, would forgo that.

It does not actually forgo it in a technical sense, but, contractually, it puts certain restrictions on it, Senator.

What happens is that you find in the Defense Appropriations Subcommittee, where you and I both work and serve, that contracts are let with respect to what is required, but a cut in SDI funding means delays and then 4 to 5 years out, when you are getting ready to move to a deployment option, you come to the further contract and further testing requirements with again more funds needed and again more delays which could make SDI, economically prohibitive.

I think, Mr. Chairman, that is one of my main points, because we are looking now at the matter of the manned space station. I am chairman of that authorization committee. In the manned space station we find that NASA estimated it to be about $8 billion just 2 years ago. Now they have an estimate of $21 billion. So these things jump astronomically.

Second, arms control treaties—all treaties are complex, but if you have ever gotten involved in them you can understand this. The Senator has said, he has just visited Geneva as a member of the observing team—I went into the tent, as they say, back in Helsinki in 1971, in August of that year. Senator Mansfield and I, for hours on end, listened to Gerry Smith, Ambassador Nitze, and Secretary Brown and all the rest of the team. In all candor, for the first hour, I didn't know what the devil they were talking about.

Then you begin to pick up the lingo and the acronyms and all the other things that go along with it, and you get the rationale, and you find out that arms control is an art. That should be remembered.

When you know that is an art, you look at the language and look for its specific meaning, and then, when you cannot find it, you look at the negotiation record and you find why it was written that way.

That has not been done by Senator Nunn. I can tell you that.

What happens is that the treaty, in reality, has not been interpreted in that light by any administration up until this point. We have not gone back on those records. You find confusion 5 years out. The treaty called for a 5-year assessment, a reappraisal, and even in the reappraisal, there are confusing statements.

This is the first administration to really go in and look back and find that negotiation record and exactly what the Soviets and we were saying at that particular time.

In short, the bottom line, Mr. Chairman, is that I do not think the administration is exemplifying a cavalier disregard for its constitutional responsibility to the Senate.

On the contrary, they went about it in a very deliberate way, with Judge Sofaer and others studying it in depth. It just so happens that the opposition is very organized, very clever, and they are moving forward with resolutions to rewrite a treaty and suggestions from Senator Nunn that the meaningful Agreed Statement D be referred to the Consultative Commission for renegotiation and agreement.

Can you imagine taking an agreement or treaty that we had ratified, trying to find out what it means, and saying now let's go back and try to agree with it? I mean, that is totally absurd.

But what happens today is that we are finding that the President's opponents and those who want to kill SDI are using the ratification record to create an ambiguity, and then taking on all the constitutional and legal liberalities thereof to say that you have to go to their narrow, interpretation of the treaty.

As I said a minute ago, it never was interpreted broad or narrow. A reading this morning of that particular treaty, along with the negotiation record, shows that there is not a broad or narrow interpretation. There is just one interpretation to it. And, under that Agreed Statement D, that is the only section of that treaty that governs systems or components based on other physical principles; namely, in space or future systems.

Article II was strictly confined, if you please, to the systems present in 1972, and words of specificity are outlined to show that current practices at that time and those present systems then of an ABM nature and its definition of an ABM system would govern.

What happens, then, is that you have someone come forward with the senatorial record and that, immediately, gets my attention as a Senator. This is a very important position that I have and the Senate is a very important body, and that is very true.

But, if you think on it, what we say on the floor sure does not say what a treaty says or what a bill says. I have just seen my distinguished majority leader last week, if you read what he said about the Contras, you'd have thought we lynched them. Why we gave them $40 million. But you would not think so.

In fact, my distinguished majority leader lost, but he stood up and announced victory.

I only give that as an example of what is stated on the floor, governing the content of a formal document is highly misleading on all scores, and Senators have different reasons for their votes.

That does not change the document itself.

The ambiguity that is brought about by the employing of the ratification record is very clever because it is all over the lot; but, in this particular instance, having been there, is very, very limited.

Mr. Chairman, I think everyone should understand that in August 1971, we had our minds on SALT I and not ABM, even in the ratification. Once we had gotten ABM, which was balanced, and controlled those things that could be controlled, we were all talking about the inequity of SALT I. Some of us voted against it. Also there was the Jackson amendment and everything else of that kind. We were really very pleased that we could get any treaty with the Soviets.

And, of course, the ABM Treaty discussion on the floor of the Senate was far, far less than the actual ABM system. We had argued for 2 years, in hours and weeks on the floor, about an ABM system to a dichotomy of one contention that if you went forward with an ABM system, Senator, you could not get a treaty. The other group said that was the way to get the treaty.

By a 1-vote margin in 1969—and I was part of that 1-vote margin—we went forward with an ABM system.

Now, when we finally have the treaty, those proponents and opponents all joined hands, and we were very pleased with respect to the fact that we could obtain a balanced, verifiable treaty with the Soviets on the antiballistic missile system.

Now, I would only state this with respect to the constitutional crisis. We did not all agree, for example, on the SALT I Treaty presented by the administration. Senator Jackson did not call or speak of a constitutional crisis. He put in an amendment. This idea of the administration misrepresenting to the Senate—Senator Jackson felt it was misrepresented, ergo the Jackson amendment.

Similarly on the matter of SALT II, a majority of the Senators around here held that one up. It was not Afghanistan. We did not think it was properly represented.

We see the President submit his budget, and he says it conforms to the level required by law. And we know it is $27 billion off. We do not say that the executive branch has caused a constitutional crisis because it put in a budget that just was not there.

I see the distinguished chairman is looking at the clock, so I will bring this to a conclusion. I think we should all understand in the filing of this statement that we shouldn't run around pell-mell hollering "constitutional crisis" at every turn about the representation, because I think the representation has been genuine. This administration is going into it, and going into it very thoroughly.

So, the treaty itself did not control the development of the testing in space. What happened was our negotiators were so instructed, Mr. Chairman, they were told you get a treaty that controls future systems. They tried again and again and again, and never obtained it.

What you see now is those same negotiators saying continually and trying to make it so in their presentations to the U.S. Senate that they acheived a ban on future systems. But a reading of the negotiation record shows categorically no ambiguity. The Soviets refused again and again and again.

And so, now we have a ratified treaty, which is very clear and very categorical. We are permitted, by anybody's interpretation, for the development and testing in space. There is a question about the deployment. If I were a Soviet negotiator, I would read it so I could deploy, because it said deployment is only controlled in accordance with article XIV. If you look at article XIV, it does not require agreement for the Soviet negotiator, and the Soviets will deploy, as they have with the Krasnoyarsk radar.

[The prepared statement of Senator Hollings may be found in the appendix.]

Chairman PELL. I thank the Senator from South Carolina very much for his views.

I see Judge Sofaer and Mr. Perle are here, but I know the Senator from Pennsylvania said that he had a question.

Senator SPECTER. Thank you, Mr. Chairman.

Senator Hollings, you were one of the 88 Senators who voted in favor of the ABM Treaty, and 2 voted in opposition.

Senator HOLLINGS. Yes, sir.

Senator SPECTER. At the time you voted—and we make a great deal about congressional intent and what is in the minds of the Senators—had you focused on the issue as to whether the ABM Treaty permitted testing in space of future systems?

Senator HOLLINGS. I had not focused on the matter of testing future systems in space. But I had certainly definitely centered on the matter of research and testing in the future, and not restricting our technology.

I talked with Senator Jackson and the others who said "Oh, no, there is no control over that." And, in fact, that did surface in the Jackson amendment on SALT I.

But, in all candor, you know, I could come up and say I did.

We did not focus on any of that. There was not any broad interpretation that we focused upon or narrow interpretation that we focused upon. We were glad to get the treaty and we moved forward with it.

The time was yielded back. No one really spoke. Only 3 Senators, and only by implication of the 100, can say they even touched on future systems in that debate on the floor.

Senator SPECTER. Senator Hollings, that would be my reading of the record. The record is plain for anyone to see. The references were very limited.

The Senate did not utilize the procedure of a reservation which would establish a specific Senate position on it. So, it seems to me, in the reading of the record, that the question is pretty much open in terms of what was in the mind of the U.S. Senate, and collectively in the minds of the U.S. Senators.

Senator HOLLINGS. I agree.

Senator SPECTER. I asked you that question because you were there and you voted.

Senator HOLLINGS. Yes.

You know, most of the things that are agreed upon are after done in the discourse that is carried on back in the Senators' offices with other Senators off the floor. In those days, we did not have TV to bring us down by recording our statements and everything else like that. So, why get into an argument over something you were going to vote for.

We were all really concentrating on SALT I and moving into that debate.

Senator SPECTER. Senator Hollings, your having said that it wasn't something that had been decided in your own mind with particularity——

Senator HOLLINGS. Right.

Senator SPECTER [continuing]. Leads me to the final question that I have, which is based on what you just said, that you had conversations with your colleagues.

Do you think that, as a generalization, to the extent that you can generalize, aside from the few Senators who made expressed comments on it, the states of mind of most of the Senators was about the same as yours?

Senator HOLLINGS. I would say so. I would say that you looked to the state of mind expressed by the Jackson amendment the same month. He talks about continuing to test and develop our strategic weaponry.

We are all concerned. You know, you cannot control thinking, and you cannot verify it with certainty. That was our way to balance off the advantage given, say under SALT I, that we had a superiority in technology. We were not about to give that away. That is how we maintain our freedom and the security of the Free World today, by our superiority in technology.

No Senator ever had in mind giving that up.

Senator **Specter**. Thank you very much, Senator Hollings.

Thank you, Mr. Chairman.

Chairman **Pell**. Thank you very much.

Senator Kerry.

Senator **Kerry**. I have just one question.

Senator Hollings, I know that you are an attorney and that you have followed this issue closely. I have read the whole public record. Though I have not yet gone through the negotiating record, I have talked with those who have.

The public record includes a number of relevant statements on this matter, including those involving Senator Goldwater, Secretary Laird, and Senator Buckley, who was one of the two people who voted against it. Senator Buckley very specifically said that he was voting against the treaty because it does not allow us to proceed forward into laser technology and future systems. But in all of the public record, there is not one single public statement by any official that does anything to say that anything other than the narrow, as it is called today, or traditional definition of the treaty is the one we should proceed on. The only thing in front of Senators publicly was that view.

The private record was specifically, withheld from the Senate. So nobody could have voted with any sense of what the private negotiating record might have or might not have been. A number of Senators specifically said the treaty does not permit us to go forward with futuristic components or systems. The Secretary of Defense said that. That is the only publicly documented position.

Now, the Constitution says that the Senate shall advise and consent as to any treaty, and the President may only sign when the Senate has advised and consented; and that once the President has signed, he is dutybound to fulfill and carry out the law of the land.

How then, constitutionally, can anyone use information not before the Senate at that moment in time to justify a reinterpretation of the treaty?

Where is the constitutional permissiveness that allows us to look at the negotiating record, which was never part of that process?

Senator **Hollings**. As a lawyer, you know that that only comes in under the parole evidence rule to clarify ambiguities.

Senator **Kerry**. But that is only as to contracts.

Senator **Hollings**. Now let me answer the question.

You have Senator Buckley's statement. I would give you Senator Fong's statement. We can balance off statement against statement.

The truth of the matter is that in order to score in this game, like any other game, you have to carry the ball over the goal line.

Now, what is happening is you, like Senator Nunn, are carrying the ratification—when you talk about the public record, you are saying on the ratification record, I am running across the goal line. I am dropping the treaty, I am dropping the negotiations which clarify and show categorically the intent and meaning of that treaty. We will just disregard that and go to Senators' statements because it is the public record.

That is the big mistake that is being made.

If you go to that treaty, as you say, as a lawyer, you will find that they definitely tried, our negotiators, time and again, to have that article II control future systems.

Rhinelander and all, they submitted the language. You can go back to the record of that negotiation. You should, because you will see that the man who is saying that now and writing articles is the one who attempted it, and failed—and failed. Time and again he tried to do it, and that held the whole treaty up, getting it together, and a meeting of the minds on the ABM Treaty itself was held up on this particular score.

So, it was not casually done.

Then they finally agreed to Agreed Statement D, which differs from an understanding. It said agreed on "other physical principles," was the way they were characterizing future systems. And then they said "and future systems."

So that is the particular section that allowed for the testing and developing, not, as you say, the public record. That sounds pretty good. But you and I, as lawyers, cannot get to that public record. We cannot ignore it.

If you and I were in a court of law, they would say, Mr. Kerry, out of order, I object, that is parole evidence. There is a contract itself and there is no ambiguity there.

Senator KERRY. If this were a mere contract and that is what we were trying to do, that might be one way to approach it. But I think, again, my question still stands.

I have spoken to John Rhinelander, I have spoken to Ambassador Smith. Their view is different from the one you are expressing today. But that is not even the issue.

It seems to me the question is how constitutionally can you insert into the debate today a negotiating record which was never a part of the debate at the time Senators voted? Senators only had one view in front of them and made a law. It seems to me, since the President is bound to carry out that law and the treaty cannot be a treaty without our advice and consent, and our advice and consent was limited to a very narrow, specific, set of information, and there is no issue about that, no one can constitutionally now say the law is something else on the basis of something that was not even in front of us.

Senator HOLLINGS. The negotiation record was in front of us. The treaty was in front of us.

Senator KERRY. No. No one saw the negotiating record.

Senator HOLLINGS. Well, you didn't have to see it because the issue wasn't brought up.

Senator KERRY. It wasn't in front of us.

Senator HOLLINGS. I answered the question from Senator Specter—none of the 100 Senators were talking about broad or narrow interpretation, and it will be proved by that negotiation record that Rhinelander is speaking in opposition to what his record shows under the negotiation.

Senator KERRY. But, constitutionally, what is the basis for a negotiating record being considered part of legislative intent when it was not part of the legislative record?

Senator HOLLINGS. The constitutional provision for the negotiation record is what is the intent and meaning of the treaty itself, and that is what we vote for, not the record, the public record of debate. You and I get up and say I vote for Contras for one reason, and you vote for another reason, whatever it is. You and I both know that.

Senator KERRY. Thank you, Mr. Chairman.

Chairman PELL. Thank you very much, indeed, Senators.

Senator HOLLINGS. Thank you.

Chairman PELL. We have been joined by Senator Biden, my cochairman.

Senator HOLLINGS. Thank you, Senator Biden, for allowig me to testify. I hope you feel better.

Chairman PELL. Thank you very much, Senator Hollings.

We have now been joined by Judge Sofaer and Mr. Perle. Thank you so much for your courtesy in coming up this morning. We appreciate your being here very much, indeed.

I think Senator Biden may have an opening statement.

Senator Biden.

Chairman BIDEN. Thank you, Mr. Chairman.

Two weeks ago, the Foreign Relations and Judiciary Committees of the Senate began joint hearings on an issue of immense significance. The administration's so-called reinterpretation of the ABM Treaty poses not simply a technical issue for lawyers, but an issue of historic proportions—a watershed decision—with regard both to the American Constitution and to American strategic policy. Will we, in this 200th year of our Constitution's history, knowingly ignore its clearly delineated imperatives regarding the making and implementation of treaties? And will we, in pursuit of a naive Presidential fantasy, abandon a strategic policy which, with broad bipartisan support, has been the bedrock of American national security throughout the crucial years of the nuclear age?

As our first joint hearing underscored, never before in American constitutional history has a President sought unilaterally to revise so fundamentally the meaning of a treaty. I wish therefore to enter a considered plea to my colleagues that, in considering Senate Resolution No. 167, they view the constitutional issues as paramount. Policy questions of strategic defense and continued adherence to the ABM Treaty can and should be resolved in the Congress in accordance with our constitutional procedures, not in direct violation of them.

In asserting the preeminence of the constitutional issue, I have no wish to feign neutrality on the strategic dimension. For 15 years, the Anti-Ballistic Missile Treaty has been the cornerstone of nuclear arms control. Ratified with near-unanimous Senate approval, the treaty expresses a recognition by the superpowers that the effort to build nationwide defenses would not only prove economically wasteful and strategically futile, but would in all likelihood diminish nuclear stability and thus expose both nations to sharply increased nuclear risk.

The principal—and I think adequately persuasive—arguments against the President's idea of erecting a full-scale population defense are that it won't work and that efforts in that direction, in violation of the ABM Treaty, will erect nothing other than an obstacle to negotiated reductions in strategic offensive systems. Strategic offensive limits and reductions simply cannot be negotiated in the absence of collateral limits on defensive systems. This reality was forcefully asserted earlier this month in a bipartisan statement signed by three former Democratic Secretaries of Defense and three former Republican Secretaries of Defense, affirming their support of the ABM Treaty's traditional interpretation.

In sum, the President's dream represents the enormously expensive pursuit of an extremely implausible goal that, even if partially achieved, would endanger the American people—a poor basis for overturning a national security policy to which this Nation committed itself by treaty 15 years ago, and which has been supported on a bipartisan basis.

Sadly, the administration's pursuit of this dream has given birth to a so-called reinterpretation of the ABM Treaty which is both unpersuasive in its historical justification and unconstitutional in its legal grounding. The first of these joint hearings—which clearly affirmed the validity and constitutional value of Senate Resolution No. 167—demonstrated this amply. As a result, I am confident that any effort to proceed with SDI activity in violation of the treaty's ban on the development and testing of space-based ABM systems would produce an intense constitutional struggle in which the administration would be the loser.

But this is not simply a petty turf dispute between two branches of government. What is at issue is the obligation of the President and the Senate together to adhere to the imperatives of the American Constitution—specificially, its delineation of the treaty power.

The Constitution creates a syllogism. The text of the ABM Treaty expresses a total and permanent—not a partial and transitory—ban on the development and testing of mobile and space-based ABM systems and components. The Senate understood that meaning in consenting to ratification, and on that basis the treaty was ratified. It is thus that interpretation which must govern the ABM Treaty's implementation; it is that interpretation which constitutes the supreme law of this land; and it is that interpretation which the President and the Senate have a solemn constitutional obligation to uphold.

In fashioning their bizarre interpretation of the ABM Treaty and of the Constitution, the architects of the reinterpretation relied heavily on an entity called "the negotiating record," which in reality comprises no more than an amalgam—of indeterminate size—of translators' notes, memcons, and internal memorandums stored in, or perhaps lost by, different offices and different agencies. At the time of the treaty's ratification, no negotiating record was even assembled. Indeed, as the administration is now demonstrating through its futile quest for ever more documents, the negotiating record is whatever the administration can find in a file cabinet to help prove its point. Yet, for the reinterpreters, even this selective approach has proven unavailing.

As two of this Nation's preeminent constitutional scholars so clearly underscored before us—and a Senate Resolution No. 167 affirms—when the meaning of a treaty is clear from the text, the ratification record, and the subsequent practice of the parties, the negotiating record has no interpretive significance. It was thus profoundly discouraging to hear the Secertary of State declare recently on national television that what counts in treaty interpretation is not what is said to the Senate but only what is said to the Soviets. That is wrong—flagrantly wrong.

Reflect on the implications of this revolutionary departure from treaty law. Suppose a President were to enter into a secret side agreement with another party that severely jeopardized U.S. national security. Suppose, for example, that in the current INF talks, our negotiations secretly permitted the Soviets to convert their SS-20 missiles into intercontinental-range SS-16's. Or suppose that United States negotiators of the Panama Canal Treaties secretly agreed that Panama could, at any time, for any reason, close the Canal to American shipping. Would those who now assert the preeminence of the negotiating record seriously contend that those side agreements should control, even though the Senate knew nothing of them when they were made?

Another red herring easily disposed of is the specter that we could somehow, through strict fealty to the Constitution, find ourselves bound to one interpretation of a treaty while the other party was bound to another, more lenient interpretation. But the ABM Treaty represents no such instance. By all evidence, the United States entered into the treaty under the same interpretation as did the Soviet Union, and in performance thus far neither party has deviated from that interpretation. What is at issue is a purposeful act of revisionist distortion, undertaken by certain administration officials in an effort to pursue the development of defensive systems in direct violation of the Treaty's express intent and thus to destroy the treaty as the foundation of nuclear arms control.

In this grossly negligent—or willful and deliberate—act of disinformation, the President's advisers have served him no better on strategic nuclear policy than they did in the debacle of the Iran affair. They have capitalized on the President's infatuation with the notion of a strategic astrodome, and while the President gazed at the stars they have walked him down the garden path.

Just as in the Iran affair, they have grossly exaggerated the benefits of their dubious policy. Indisputably, the United States needs a solid program of research on defensive technology, both to hedge against and deter Soviet "breakout" from the ABM Treaty and to investigate the possibility of limited defensive deployments that might—as envisaged by the ABM Treaty—enhance nuclear stability. But as even administration officials have repeatedly acknowledged, such research can be adequately conducted within the ABM Treaty's limits for many years to come. Ironically, the only test now contemplated that would violate the treaty's traditional interpretation—the test of a space-based kinetic-kill system—would also violate the so-called broad interpretation because it relies on a traditional rocket for propulsion and a kill mechanism no more futuristic than the rock David hurled at Goliath.

And, just as in the Iran affair, the architects of the reinterpretation have grossly underestimated its costs. Implementation of the reinterpretation would block agreement on strategic offensive systems and induce a proliferation rather than a reduction of such systems. It would sanction an accelerated Soviet defense program—also directly contrary to American security interests. It would weaken the Atlantic Alliance, by further intensifying allied doubts about American leadership. It would, through flagrant disregard, weaken the fabric of international law. And it would, by directly challenging the Constitution's delineation of the treaty power, lead inexorably to a divisive and debilitating constitutional struggle.

Let me welcome our witnesses here this morning by stating this: The only act more constitutionally ignominious than promulgating the reinterpretation would be for the Senate to accept it.

Judge Sofaer, Secretary Perle, we are pleased to have you here.

[Senator Biden's introductory statement on S. Res. 167 may be found in the appendix.]

Chairman **BIDEN**. I hear five bells.

The committees will recess for 10 minutes.

[A brief recess was taken.]

Chairman **PELL**. This joint hearing of the Senate Judiciary and Senate Foreign Relations Committees will come to order.

My cochairman, Senator Biden, is here, and I will turn over the gavel to him.

Chairman **BIDEN**. Thank you.

Judge Sofaer, neither you nor Mr. Perle has yet had an opportunity to make your opening statements. Then please proceed.

Mr. **PERLE**. If I might, I would begin, Mr. Chairman.

STATEMENT OF HON. RICHARD N. PERLE, ASSISTANT SECRETARY OF DEFENSE FOR INTERNATIONAL SECURITY POLICY

Mr. **PERLE**. I appreciate the opportunity to appear before the Committees on Foreign Relations and the Judiciary together with my friend and colleague, Judge Sofaer.

In nearly 20 years of Government service, I have always regarded deliberations of this nature with the utmost seriousness, attaching to them the high purpose of that essential collaboration between the Congress and the Executive that has enriched our public policy and our democratic institutions.

There is a certain irony in my appearance here today as a representative of the Department of Defense, for it was my privilege 15 years ago to participate in hearings on the very subject now before us as a member of the professional staff of the U.S. Senate.

On that occasion, I had the honor to assist Senator Henry Jackson in his effort to comprehend the meaning of the ABM Treaty and to do so with the conscientiousness and thoroughness for which he was so rightly admired by his Senate colleagues.

Scoop's judgment that the Soviet Union would relentlessly exploit all of the latitude the treaty and the associated interim agreement allowed has been confirmed countless times since, often with consequences that have damaged our security and added greatly to the burden of defending our Nation and our freedom.

More than any of his colleagues, he realized that imprecision, ambiguity, and uncertainty as to the meaning of the rights and obligations undertaken through the treaty process would reward the Soviets with opportunities that would, inevitably, be denied to the United States.

This is why much of the record of the ratification process was created by his probing and questioning of executive branch witnesses, who sat, in 1972, where Judge Sofaer and I sit today.

As the President's strategic defense initiative got underway after 1983, following more than a decade of neglect in the development of defensive technologies, the issue of precisely what activities the ABM Treaty prohibited became essential to the conduct of our program of research, development, and testing.

To this Nation of laws, it became urgent to understand the nature of the legal obligations that we and the Soviets assumed when, on May 26, 1972, President Nixon and General Secretary Brezhnev entered into a contract that we called the Treaty on the Limitation of Anti-Ballistic Missile Systems.

We undertook a systematic, deliberate, and thorough review of the treaty. Where the treaty was unclear or ambiguous or apparently contradictory, we examined the record of the negotiations, in order to understand precisely where agreement had been reached between the parties and where the parties differ, and how the compromises reached between us had been achieved and how they were to be understood.

This review was conducted in good faith and with the integrity and conscientiousness that we, who have taken solemn oaths of office, have pledged to uphold.

We came to the conclusion that, despite the desire on the part of our negotiators to conclude a treaty prohibiting the development and testing of certain, new defensive technologies, the Soviets had failed to accept the proposals that would have obligated them as we wished. The President decided accordingly, that the ABM Treaty did not prohibit either of the parties from the conduct of development and testing of space-based systems and components based on what the treaty refers to as "other physical principles."

We, thus, arrived at an interpretation of the treaty that differed from the interpretation now held by most of the officials involved in the negotiations that culminated in the ABM Treaty.

Indeed, we concluded that statements made by officials of this administration that were based on the repetition of earlier statements made by some officials of previous administrations, were seriously in error. And we sought to set the record straight.

Looking back, one can only wish that we had been more rigorous, more probing, more effective in unearthing, in 1972, the understanding that we achieved only after the review to which I have referred, which was undertaken 13 years later.

I hope that these committees will study the treaty and the negotiating record carefully. You will find contradictory statements. You will find ambiguity and imprecision. You will find conflicting testimony. You will find differences of opinion. You will find here, as so often in matters of this sort, that there is room for men of honor and integrity to differ over where the preponderance of the evidence lies. And you will find that rancor is no substitute for reason, as you contemplate the arguments on both sides.

As you reflect on this crucial issue, I urge you to apply a simple test in your deliberations. Ask yourselves this question: If the Soviets were to have tested an ABM system or a component based on other physical principles in space, and if we were able to observe them doing so, how would they have responded if challenged under the treaty interpretation that was presented to the Senate by many officials in 1972?

There is no doubt in my mind that they would have invoked Agreed Statement D from the treaty. They would have insisted that they never agreed to prohibit such a test, that the treaty itself and the negotiating record support the conclusion that the creation of systems and components based on other physical principles is permitted by the treaty.

I have no doubt that we would have acquiesced, just as we have done in other like cases.

What is really at issue is whether we will restrict ourselves in a manner that the Soviets would refuse to be restricted if they were in our position and we were in theirs.

In a deeper sense, the question before us is whether we will, by tying our hands in a manner that is neither necessary nor wise, dash the hope that we might continue the SDI Program in an efficient and effective manner. For adoption by the Congress of a restrictive statute prohibiting the development and testing, upon which the success of the SDI Program ultimately depends, will damage at once and in time destroy this vital program to defend against ballistic missiles.

We are, Mr. Chairman, at a critical stage in our negotiations with the Soviet Union. For more than 6 years, we have sought to negotiate deep reductions in intermediate and strategic offensive weapons. We are closer now than we have ever been to achieving results that, until recently, seemed to many to be remote, or even utopian. We have within sight an agreement virtually eliminating intermediate missiles from the arsenals of the Soviet Union and the United States.

We are hard at work on an agreement that would reduce strategic weapons by one-half. We are in the final months, the home stretch, after 6 years of determined bargaining across the negotiating table in Washington, in Moscow, in Iceland, and in Geneva.

If you act now to shackle the SDI, the most effective program we have, if you diminish the funding that keeps it going, or encumber it with restrictions the Soviets have never accepted and that we could not hope to verify, we will almost certainly fail.

I hope, Mr. Chairman, and I believe, that the Congress will give the President the strength he needs, the support he must have, the partnership our Constitution has placed within reach, to finish the task before us.

Thank you.

[The prepared statement of Mr. Perle may be found in the appendix.]

Chairman Biden. Thank you.

Judge Sofaer.

STATEMENT OF HON. ABRAHAM D. SOFAER, LEGAL ADVISER, DEPARTMENT OF STATE

Judge SOFAER. Mr. Chairman, thank you very much. I got the impression from your earlier remarks that you disagreed with us on some things.

Chairman BIDEN. Strongly.

Judge SOFAER. But I take the spirit of the ending of your remarks positively, and I am here to help.

I would have preferred to come after April 30, when our studies, which are still underway, are complete, and I hope you will invite me back then to continue this dialog so that we can go deeper into the very, very complicated questions that are arising in this review.

Chairman BIDEN. I can assure you that you will be invited back.

Judge SOFAER. I'll be here.

I will try to summarize my statement. It is really fairly extensive, because I felt that the resolution that you proposed, Senator, raises such serious questions of international law that I should address those. Since they are not directly related to my study of the ratification record, I thought I could spend some time in addressing particularly a couple of the sections in that resolution.

Now, the ABM Treaty review, as many of you know, began, as far as I was concerned, in 1985, when I was asked to prepare a legal analysis of the text and the negotiating history of the treaty with respect to the development, testing, and deployment of what we call OPP, or other physical principle systems.

On the basis of that study and other studies that had been done during 1985, President Reagan concluded that a broader interpretation was fully justified. At the same time, he announced that he would not, at that time, restructure the SDI Program on that determination, promised to consult with Congress, and ultimately, last August, we submitted the study that was prepared by my office and by me personally of the treaty and the negotiating history to the Senate for its review.

Earlier this year, before considering whether to restructure the SDI Program, the President concluded that he would require comprehensive analyses of two other aspects of the treaty interpretation question—the Senate's ratification proceedings and the parties' subsequent practices. He ordered my office to complete these studies by April 30 and, together with the negotiating record, they will add to the foundation for the President's decisions about the future of the SDI Program and its relationship to the ABM Treaty.

In recent statements on the Senate floor, Senator Nunn focused criticism on a preliminary study of the ratification process that was prepared by my office in October 1985, in response to a request made in a congressional hearing. As Senator Nunn pointed out, that memorandum was not complete. It omitted certain relevant material. The errors he cited had been corrected in August 1986, but the study remained inadequate. It is a serious matter, Mr. Chairman, but should be kept in perspective.

That memorandum and its conclusions were never relied upon by the President in evaluating the broad interpretation, and it does not represent the administration position.

I am presently preparing, with several members of my staff——

Chairman **Biden**. Excuse me. What was the basis of the reliance, then? On what did the President rely?

Judge **Sofaer**. The President, in 1985, relied on studies of the text and the negotiating record.

Chairman **Biden**. By whom? Whose studies?

Judge **Sofaer**. One of the studies was by me. It was not the study that I am referring to that was submitted to the House.

The study submitted to the House is a public study that is not classified. The study that I submitted to the President in its revised and final form has been submitted to the Senate and is classified and is in S-4. These are two separate studies.

We are preparing a thorough, comprehensive study of the ratification record and of the subsequent practice of the parties, which I will personally review. The President has, furthermore, promised full consultations on this issue with Congress and the allies before making up his mind as to what actions are appropriate. He is well aware that in this respect, as in all other defense-related matters, he needs Congress' support on a bipartisan basis to protect the Nation's interests.

Viewed in light of these unprecedented steps, I question the characterization that the President's actions have created any kind of constitutional crisis. He has announced his belief, shared by his senior advisors, that the Soviets never committed themselves to the so-called narrow interpretation.

However, the President decided not to restructure the SDI Program at that time. Moreover, he decided, in August 1986, to adopt the unprecedented step of sharing with the Senate our study of the negotiating record, long after the ABM Treaty had been ratified.

In February 1987, when he began seriously to consider the possibility of restructuring the SDI Program, he took the steps necessary for full consultation with Congress and our allies to be completed prior to making a decision.

He has indicated his intention to consult fully with Congress on the results of the studies, including the legal studies, and obtain the judgments of legislative leaders, including members of these distinguished committees.

This is not a scenario that should be characterized as a constitutional crisis or confrontation. Rather, the President is moving carefully and in full cooperation with Congress, which he needs, in his consideration of a sensitive and important aspect of his duties.

Now, having said that, Mr. Chairman, I would like to say that the resolution that was proposed on March 11, 1987, and which is the focus in part of this hearing, proposes rules for the interpretation of treaties generally and then offers specific conclusions as to the ABM Treaty in particular.

I can comment on the general principles the resolution proposes.

I fully agree with the proposition stated in section 2(1)(b) that the President may ratify only the treaty to which the Senate advised and consented.

The treaty power is a special aspect of our Constitution, but it is similar to other aspects of the Constitution which reflect the framers' intention to have a government of shared or mixed powers. The Senate and the President are partners in the treatymaking process, each with its own role, each needing the other's concurrence to act effectively.

The statement by Professor Henkin in this hearing that the President can only ratify the treaty to which the Senate consents is unobjectionable. The issue always in the context of our international obligations is what is that treaty to which the Senate advised and consented.

The key question posed by the resolution is by what standards should the President or the Senate determine the meaning of the treaty ratified before the issue of interpretation arises.

Likewise, the resolution properly states that a treaty is a law, and that the President must take care that all laws, including treaties, be faithfully executed under article II, section 3, clause 4, of the Constitution.

Once again, however, the question remains what is the treaty that is the law that the President must faithfully execute? How is its meaning determined?

Now, the resolution before these committees proposes several rules by which it would require such determinations to be made. Some of those rules are perfectly consistent with international practice, and particularly the one that says the meaning is informed by reference of expressions of intent by the Senate.

But, the resolution misstates the law in at least two important respects.

It is wrong, first, in the special weight it seeks to accord to what it defines as "Senate acquiescence in any interpretation communicated by the Executive." It is also wrong in attempting to mandate that "to the extent the meaning of a treaty is clear, from how the Senate understands it and from the treaty's text," anything not transmitted to the Senate during the process of advice and consent, "including the negotiating record, is not relevant to the meaning of the treaty."

These standards are simply inconsistent with international practice for many of the reasons that I will state in more detail in my paper.

The effect of ratification proceedings on the international obligations of the United States can be and was intended to be profound. The Senate is able in a variety of ways to have a powerful, even decisive, impact on the international obligations of the United States. The Senate has the power to decide in each instance just how far it wishes to go in establishing the meaning of a treaty on any question of interest to the Senate.

A treaty is a law, Mr. Chairman, but a treaty is more than a law. A treaty is a contract, an international contract, and the Senate is as responsible as the President for making sure that the contracts made in behalf of the United States are mutually enforceable and do not create unilateral duties.

In implementing its important powers, therefore, over the meaning of treaties, the Senate has developed a set of practices to insure that the Senate's determinations and opinions have the same degree of binding effect on our treaty partners as they do upon us.

The Senate acts to incorporate proposed interpretations as amendments, reservations, understandings, or other conditions in the Senate's resolution of ratification.

The resolution of ratification is the document by which the Senate formally grants advice and consent, and it typically requires the President to take appropriate action in connection with ratification, and it makes the other side bound to those conditions or understandings to the same extent we are.

Now, I will skip some of the examples I give in my paper, Mr. Chairman, such as the Panama Canal example and the examples in SALT II. I want to come to one particular——

Chairman BIDEN. Excuse me. May I interrupt for a second.

Let me say that there has been an objection lodged to our meeting beyond the hour of 12 o'clock. As you can see, there is some keen interest in this here. I would like to ask you if you would be able to curtail your statement somewhat to the next 2 minutes or so, and end it, so that maybe we can get to some questions.

Judge SOFAER. I will do even better than I have been doing on that. I have been cutting as I went along, and I was just skipping three pages.

Chairman BIDEN. I know, and I appreciate that.

Judge SOFAER. Now, let me skip over on this point, Mr. Chairman, to the simple fact that these terms, these expressions in the resolution of ratification, are given extremely important weight under international law. They either become the terms of the treaty or the context in which the treaty is made. And they are in sharp contrast to Senate actions that are not contained in the resolution of ratification.

Now, I will skip over to page 19 of my statement, Mr. Chairman, where I bring to your attention a November 1977, Senate Foreign Relations Committee staff memorandum, entitled, "The Role of the Senate in Treaty Ratification," which draws the clear distinction that I spell out in much more detail in my paper, between the effect of ratification proceedings——

Senator HELMS. Mr. Chairman, if I may, I would say to the Judge that I think you are skipping something in your prepared text that I do not want you to skip.

Now, I would rather hear from you than a lot of meddling questions going on because you don't get your chance to say very much.

Chairman BIDEN. I can understand why you would.

Senator HELMS. Absolutely. [Laughter.]

So I suggest you go back to page 13, in considering the SALT II Treaty, and let the American people know about that. Don't skip over that. Don't assume that the American people know what you are talking about because they don't. The news media have taken care to make sure that they don't know.

So I would appreciate your going back to page 13 and using your entire statement.

Chairman BIDEN. If the witness would hold for a second, we'd really have a very good hearing if we could get the objection to the meeting withdrawn. Then we could have him read his whole statement and we could stay here well into the day.

Senator HELMS. Better still, why don't we defer this——

Senator THURMOND. I assent, and would say that I do not object to going beyond the time. I withdraw my objection.

Chairman BIDEN. Great.

Senator **Thurmond**. I am amazed that you are having the hearing today. I requested the chairman of the Judiciary Committee that the hearing be delayed while this man is making a study and prepares to testify April 30, to give us a complete study. The administration wants him to go into it very thoroughly.

Senator Helms, I understood, requested the chairman of the Foreign Relations Committee to do the same, and each blamed it on the other.

So, I don't know whose fault it is, but I think it is a disgrace that you are having a hearing without waiting until this man is ready. He was not ready today, as I understood, and the study won't be completed until April 30.

But, since he is here, there is nothing to do but go ahead, I guess.

Senator **Helms**. Mr. Sofaer, you take your time and get your point across.

Chairman **Biden**. Thank you, Senator Thurmond.

Judge **Sofaer**. Senator, I am glad the Senators have worked this out. [Laughter.]

I am going to abide by whatever order I get.

Senator **Helms**. Abide by the latest one you get.

Chairman **Biden**. Unfortunately, there was an election that intervened and changed chairmanships. [Laughter.]

So, I think you have to abide by this one.

Senator **Helms**. We can vote on it. [Laughter.]

Chairman **Biden**. What I would like to say is if there is no objection to us continuing to meet, I would like to hear your whole statement, if there is no objection.

Senator **Helms**. Very well. That is all I was saying.

Chairman **Biden**. Since there is no objection that we are able to meet, go right ahead. I hope to hear your whole statement.

Judge **Sofaer**. Well, I will still edit as I had intended to edit.

Chairman **Biden**. Good.

Judge **Sofaer**. Let me go back then and give the example of the Panama Treaties, where the Senate conditioned its advice and consent on a series of amendments, reservations, understandings, and other conditions, some of which address the meaning of specific treaty provisions.

The Senate's resolutions of ratification required that the President include in the United States instruments of ratification all of the conditions in the Senate's resolutions and that certain of these conditions be included in both the United States and the Panamian instruments, or in a bilateral agreement called a protocol of exchange to be signed by the two parties at the time of ratification.

In SALT II, Mr. Chairman, there were three sets of conditions and reservations that were worked out with great detail. The Senate fully understood the significance of its enormous power to effect a meaning of the treaty through the device of its resolution of ratification. I will skip those examples.

What these examples show, is that the Senate may, through its resolution of ratification, oblige the President to act to ensure that the other party is legally bound to an interpretation of treaty terms. They also show that the Senate is fully aware that the proper and effective way to bind treaty partners is to secure their express, written agreement to conditions or other terms.

Finally, this practice reflects that, by implication, our treaty partners are not bound by interpretations as to which they are not given formal notice prior to ratification.

As I was saying, Mr. Chairman, the difference between the evidence in the resolution of ratification and the evidence of things that are said during the ratification proceedings is recognized in the Vienna Convention on the Interpretation of Treaties and the aspects of a resolution of ratification are given far, far more weight.

How the record of internal ratification proceedings fits into the scheme of the Vienna Convention is unclear. The internal ratification proceedings of one of the parties to a treaty may shed light on that party's understanding of the meaning intended by its terms and the object and purpose of the treaty. Standing alone, however, such proceedings would not appear to be part of the context of a treaty or the material cited in article XXXI. Such evidence might qualify under article XXXII as supplementary materials and appear to have been treated as such by various scholars.

Assuming that, this would make these supplementary materials of the same value essentially as the negotiating record.

Furthermore, one has to be very careful with these kinds of materials in the international context because they represent the views expressed in the internal processes of only one of the parties.

Now, the November 1977, Senate Foreign Relations Committee staff "Memorandum on the Role of the Senate in Treaty Ratification" draws this clear distinction between the effect of ratification proceedings on U.S. international obligations, as opposed to U.S. domestic law. It states, and I quote: that "the committee reports"—talking about the reports of the Senate Foreign Relations Committee—"although purely domestic documents and of no concern to other parties, have value to the executive and judicial branches in interpreting the intent of the Senate. They serve as legislative history in the event questions should arise over the meaning of a treaty. * * * Statements and colloquies by the floor manager of a treaty serve a similar purpose."

These documents and the statements in the Senate in the ratification proceedings are, infact, purely domestic documents of no concern to other parties except where, in a particular case, the U.S. Government acts formally to communicate such matters to the other side. In such a case, an interpretation communicated to the other party, while not binding, could have probative weight in determining what the parties intend, depending on the manner in which the statement is communicated and the response, if any, made by the other party.

This is why the Senate has regularly insisted upon incorporating its serious concerns into the resolution of ratification.

Mr. Chairman, I will remind you of the United States-United Kingdom Treaty that we lived together with for a long time, in which you insisted on certain changes which you got. You insisted on them. They were put into the resolution of ratification. We confirmed those by way of an exchange of diplomatic notes.

The Genocide Convention was another example of that.

Mr. Chairman, the interests of the United States would be disserved by adopting the resolution's treatment of the weight to be accorded to statements made in the internal ratification proceedings. The United States presently regards itself as having no duty—none—to monitor or respond to statements made in the ratification proceedings of other nations unless the statements are formally communicated to us.

If we were charged with knowing what went on during such internal proceedings, we would, among other things, have to detail lawyers and technical people out there to follow those proceedings and report back. Such a practice makes no sense, moreover, because we could not successfully insist that other nations monitor and respond to statements at ratification hearings in our Senate.

Like the United States, these other states do not regard themselves as obliged to follow our domestic activities. They rely upon the written instruments and other formal communications as the proper means for conveying the views of the United States on the meaning of treaties.

Other sound reasons exist for avoiding such a rule. You know, Mr. Chairman, much better than I do, the vagueness with which these Senate exchanges can sometimes take place, the fact that they do not create a clear record in so many instances.

The phrase in the resolution, "Senate acquiescence in any interpretation communicated by the Executive," is particularly vague and will create great uncertainty.

To infer Senate approval from acquiescence, moreover, would be a dangerous practice, certainly one with no sound, empirical basis. Experience shows that the Senate deals in general in an authoritative manner only with what it must deal or with what it wants to deal. The Senate, as a body, often forms no judgment of approval or acquiescence on matters it is presented, especially when they are relatively minor concerns in a treaty's consideration.

For these reasons, it is essential to judge the evidentiary value of ratification proceedings in the context of determining international obligations by reference to the degree to which their substance is formally communicated to the foreign government in question, and the manner in which the foreign government responds.

Now, I go on to another point, Mr. Chairman, and that is this. I think the resolution gives too little recognition to the President's substantial discretion in the interpretation of treaties.

The President has this power pursuant to his responsibilities to enforce the laws and to conduct the foreign affairs of the United States and the courts give, typically, great deference to the manner in which the executive branch interprets a treaty.

Of course, the President cannot, and should not, disregard views expressed during Senate proceedings which are of considerable importance. This administration has never said otherwise.

Senator Biden, may I read to you from Secretary Shultz's actual statement on that television program, which is slightly different, but importantly different, from what you were led to believe.

He said, "Let me emphasize here a point that I think you made in one of your questions that I think is extremely important. Obviously, we are interested in what was said during the ratification process here. But remember, that has absolutely no standing insofar as the Soviets are concerned."

That is the point that we are making here today—"insofar as the Soviets are concerned."

We do believe that such statements have standing insofar as the Senate is concerned and insofar as our relationship with the Senate is concerned. We understand that such statements create an obligation upon us to come to you, to deal with you on the implications of those statements.

If you will read my August 1986, memorandum, which is in S-4, I explicitly say this memorandum is not addressed to any duties created by the entire ratification process for the President to the U.S. Senate.

So, the President cannot and will not and does not disregard those statements.

But the Nation has developed an allocation of powers and a set of practices concerning treaty interpretation that works well and should not be abandoned over a particular controversy on all aspects of which the President wishes to work closely with the Senate.

Now, subsection 2(c) of the proposed resolution seeks to limit the President's power of interpretation in connection with the negotiating record. I think that would be very unwise, Mr. Chairman.

It would be fundamentally unacceptable to all our treaty partners, and with good reason. The Soviets, incidentally, have repeatedly referred to the negotiating record in our dealings with them in the SCC and elsewhere.

We cannot unilaterally interpret treaties based on the uncommunicated and unconsented understanding of one of our internal branches of Government.

Chairman **Biden**. Would you repeat that again, please.

Judge **Sofaer**. We cannot unilaterally interpret treaties based on the uncommunicated and unconsented understanding of one of our internal branches of Government. We would not accept any such effort by another nation.

The only practical effect of the rules proposed in the resolution would be for the Senate of the United States to limit the President of the United States to a legislatively mandated meaning of a treaty, irrespective of what the treaty really means, and what a treaty partner may be free to claim the treaty means.

The United States would be put at a significant disadvantage if the President is subject to stricter constraints as a result of internal understandings of the Senate than those which apply to other parties. Neither the Senate nor the President should have any interest in depriving our nation of the benefits of mutuality of obligation in its treaty relations.

Now, we fully recognize the importance the Senate attaches to Executive communications and that these have to be dealt with. At the same time, human experience demonstrates that errors sometimes occur. People sometimes exaggerate and misunderstandings take place.

The Senate has ample remedies for these dangers which can be used without prejudicing U.S. interests in its international relations. The Senate can, of course, include understandings in a resolution of ratification. It can also insist on being adequately informed on issues during the treaty ratification process.

Requests were tentatively advanced during consideration of the ABM Treaty for instructions and for the negotiating record. But they were not pressed.

Senator Jackson at one point mentioned that the State Department had promised him an analysis of the treaty, a section by section analysis. But a legal analysis was not formally requested and never provided.

Now, what I am saying, Mr. Chairman, is that our present system works and the solution described in Senate Resolution 167 would not work. It would create chaos in the applicable law and would have no international effect beyond prejudicing the United States by depriving us of the right to insist in some cases on mutuality of obligation.

In evaluating the Senate's prerogatives, moreover, the Senate should evaluate all of the implications of giving binding effect to the statements of executive officers on the meaning of a treaty.

The Senate, of course, is entitled to full and fair presentations by executive officials on the meaning of every aspect of treaties under Senate consideration. But the Senate's interest in full and fair consideration and presentations is to inform itself of the treaty that was actually made. When it gives its advice and consent to a treaty, it is to the treaty that was made, irrespective of the explanations it is provided.

Chairman **Biden**. Would you say that again? It is to the treaty that is made, irrespective of the explanations of what the treaty means, given by the Executive to the Senate?

Judge **Sofaer**. That is your main interest. Yes, Mr. Chairman, I would say that.

Chairman **Biden**. That is incredible. That is absolutely staggering.

Judge **Sofaer**. Well, let me finish.

Chairman **Biden**. I'd like to hear the rest of this.

Judge **Sofaer**. And I'd love to talk to you about it.

Chairman **Biden**. Oh, we will. [Laughter.]

Judge **Sofaer**. The Senate should not adopt rules that would, in effect, enable an executive officer to come in here and transform for the United States the treaty obligations actually negotiated. That result would, in fact, far more seriously undermine the Senate's role than the possibility that the Senate may, from time to time, be inadequately informed on a matter that was insufficiently important to lead the Senate to issue some form of qualification on its formal advice and consent to ratification.

Senator **Leahy**. Excuse me, but by "executive officer," do you include the President of the United States among the executive officers who are precluded from telling us what they mean?

Judge **Sofaer**. Senator Leahy, no one is precluded from telling the Senate what a treaty means. It is the obligation of the Executive to tell the Senate what a treaty means. But the Senate is not just like Congress in treatymaking.

Senator **Kerry**. Before or after they vote on it?

Judge **Sofaer** Before they vote on it. It is not just like a Congress. It is more than just a law, a treaty. It is a contract with a foreign country, and the Senate is the President's partner in this through advice and consent.

The Senate is supposed to and does engage in a really meaningful dialog with the President, with the executive officers, on the meaning of a treaty to the extent that the Senate takes an interest.

When the Senate adopts a treaty, it does not just adopt a law with the legislative history that the Senate heard, it adopts the treaty with the negotiating record, along with its entire legislative history.

So, that's it.

[The prepared statement of Judge Sofaer may be found in the appendix:]

Chairman **Biden**. Thank you very much.

We have a number of Senators present, so I think we should go by the 5-minute rule, which means you will get absolutely nowhere the first time around, but maybe by the second time around we can proceed in a little more detail.

Let me make sure that I understand a couple of things, Judge Sofaer.

I refer to your March 9, 1987, letter to Senator Nunn and an account given by Senator Levin that he placed in the Congressional Record of his March 12 meeting with you. You indicate in your letter to Senator Nunn that the October 1985 analysis of the negotiating record "did not provide a complete portrayal of the ratification proceedings with respect to this issue."

You wrote further that you "did not review this material personally."

Now, according to the letter, you are conducting another study to which you made reference here, where you said, "I will personally review this material to satisfy myself that the analysis we present is correct."

According to Senator Levin, you repeatedly disavowed the 1985 memorandum regarding the ratification record of the ABM Treaty, and you described your 1985 memorandum as an incomplete review of the ratification record which was prepared by young lawyers on your staff.

Now, Judge Sofaer, you have had, in recent months, no hesitation in making categorical statements to the effect that the ratification record of the ABM Treaty supports the broad interpretation. You made those statements in a number of different forums, one of which you referred to here earlier, the House of Representatives, on October 27, 1985. And you made them in a speech on April 1986 to the American Society of International Law, and you made them in a June, 1986 article in the Harvard Law Review.

Now, my question is this. Is it fair to presume that you no longer stand by those statements and those articles?

Judge **Sofaer**. Well, I think what you said I said is what I stand by. I do not stand by the October memorandum that relates to the ratification process.

I felt that it was better to admit that it was a mistake and to be inconsistent, if I had to be, than wrong twice.

Chairman **Biden**. How about the Harvard Law Review article?

Judge **Sofaer**. Well, the Harvard Law Review article mainly deals with the treaty language, the negotiating record, and a number of other things, and I stand by almost everything in that Harvard Law Review article. There may be statements in that article that rested on that same research. If so, they would be erroneous.

Chairman **Biden**. It would be very helpful, if you would give us an analysis of what part of the law review article is still accurate and what part may not be. It may all still be accurate, but it would be useful for us to know that.

Judge **Sofaer**. Well, Senator, mistakes like this do happen.

Chairman **Biden**. Oh, I'm not suggesting that they don't. I'm just trying to figure this out. For example, you just said there are some parts of the law review article that you don't stand by. I don't want to presume to judge which ones you don't stand by. Rather than have me characterize what is wrong with the article, it would obviously be more helpful for you to characterize what is wrong with the article. That is all I am asking you to do.

Judge **Sofaer**. I would hope that we would not spend time looking at the Harvard Law Review article which was prepared around the same time as the testimony in late 1985, certainly months before it was published, and focus instead on the merits of the issue before the Senate.

Chairman **Biden**. The only reason why we are is that many people are using that law review article as evidence to sustain the point that the broad interpretation is useful.

If you are suggesting here and are saying on the record that that should no longer be done, then there is no need to review it.

Judge **Sofaer**. That should no longer be done with respect to the ratification process.

Chairman **Biden**. I will skip next to Mr. Perle since my time is about up, though there is much more I have to ask you about, Judge.

Mr. Secretary, you said in your statement that the narrow interpretation is one we could not hope to verify. Isn't it true that Senator Jackson voted for the treaty on the basis of the narrow interpretation?

Mr. **Perle**. No.

I think Senator Jackson voted for the treaty, along with 87 of his colleagues, because it was inevitable that the treaty was going to pass and he wished to focus attention, as he did, on the inadequacies of the Interim Agreement on Offensive Forces. There is not a doubt in my mind that that is what animated the Senator. If you look at his remarks on the floor of the Senate during the long debate in which the ABM Treaty was scarcely mentioned, I don't think you will find any reference by him to the interpretation of Agreed Statement D, which was a trivial issue at the time in the Senate's consideration.

Chairman **Biden**. I agree that it was trivial because everybody agreed that it meant what it appeared to mean and not what you all now say it means.

Mr. **Perle**. It was trivial because nobody paid any attention to it.

I can recall how difficult it was to get people to sit through hearings, at which we tried to explore the record in order to understand what the treaty meant.

Chairman **Biden**. My time is up. I will come back on the second round.

Thank you, Mr. Chairman.

Chairman PELL. I would defer to Senator Thurmond at this time as we go back from party to party as well as Committee to Committee.

Senator THURMOND. Thank you, Mr. Chairman.

As I understand it, Judge Sofaer, you are making a study of this treaty now and will have that study completed by April 30. Is that right?

Judge SOFAER. Senator, we have studied the negotiating record and the text, and that study has been filed with the Senate and is available to all Senators.

What we are studying, pursuant to the President's order, is the ratification process, which involves more than just the ratification record, Mr. Chairman, as well as subsequent practice. Those two bodies of law and facts and evidence would be relevant to the proper determination under international law of the meaning of a treaty.

Senator THURMOND. Now, if we go forward with SDI, which is vital, many people feel, the President feels, I feel, many people feel it is essential that we do that, this treaty should be construed in a broad way, shouldn't it?

Judge SOFAER. Well, Senator, I am just a lawyer. I have heard a lot of stuff about me recently that makes me into something that I am not.

I am a lawyer. I was asked by the President of the United States what the scope of his discretion is under the ABM Treaty.

Now, it is quite clear that he can renounce the treaty. He can also negotiate with the Soviets about the treaty. But the question is does he have any other options? A lawyer is supposed to tell his client if he has any other options.

I looked at the treaty. A lot of people said that it was clear and unambiguous. Everyone now agrees that it is ambiguous—or a lot of people do, anyway. And the negotiating record was supposed to be unambiguous, and now a lot of people, including Senator Nunn, agree that it is ambiguous.

I reported to the President on what I found about the treaty and the negotiating record. Now I am going to report on what I find about the ratification record and subsequent practice.

I feel a lawyer has an obligation to tell his client what his options are and his client, in this case the President of the United States, has the power to decide how to proceed.

Senator THURMOND. I understand.

Now, as a matter of fact, isn't it generally admitted that the Soviets have violated this treaty, that they have violated it with the radar plant at Krasnoyarsk and in other ways? Or have you looked into that?

Judge SOFAER. Virtually everyone that I know of admits that.

Senator THURMOND. Everyone has agreed that they have violated it, haven't they? And that would give us the right, for that reason, to rescind the treaty.

Judge SOFAER. Well, Senator, that is a relevant factor. And when I finish the studies, we will come back and write an overall paper for the President that takes into account all the factors, including Soviet violations, and tell him what the scope of his discretion is in our judgment.

Senator THURMOND. Also, if we did not cancel the treaty because of their violations, which we have a right to do, couldn't we make a proportional response? In other words, couldn't we respond to their violation in some way?

Judge SOFAER. That would be the relevant concept; yes, sir.

Senator THURMOND. That would be a second way.

And a third way could be we could rescind the treaty upon 6 months' notice, couldn't we?

Judge SOFAER. Yes, sir.

Senator THURMOND. So there are three ways that we can proceed.

The whole thing seems to be that some of those who are against the President, fighting the President, who do not want to go forward with SDI are using that as a means to oppose him.

Also, isn't it true that if we are going to develop SDI, which is a purely defensive weapon—it doesn't kill anybody; it does not destroy any property; it merely knocks down missiles that would kill people and destroy property—if we are going to go forward with that, isn't it necessary that we take this broad interpretation unless we follow one of these three ways that I just mentioned?

Mr. PERLE. Senator, if I might try to answer that, I said in my opening statement that I believe that imposing the narrow interpretation on the program would do severe damage to the program and would make it far more expensive, far more difficult to achieve success, and it might, in the end, prove fatal to the program.

Senator THURMOND. Why should we want to end the program?

Mr. PERLE. We don't, Senator.

Senator THURMOND. I was one of the eight Senators who went to Russia and talked to Mr. Gorbachev for 3½ hours. All he wanted to talk about was demilitarizing space. Of course, under that, we could not go forward with the SDI. That is the ace in the hole. He is scared to death of it. The President wants to go forward with it and we should cooperate with him for the good of our country.

Thank you, Mr. Chairman.

Chairman PELL. Thank you very much, Senator Thurmond.

Mr. Perle, the members of the 1972 delegation who have testified so far maintain there was agreement between the American and the Soviet delegations that the so-called narrow interpretation would apply to future ABM technology. As I understand it, the adminitration feels that there was no such agreement.

How do you account for this discrepancy?

Mr. PERLE. I think that if one goes back and looks at the exchanges that took place leading up to the signature of the treaty, one will find a repeated effort by the American negotiators, who had instructions, to try to obtain Soviet agreement to what we now call the narrow interpretation. The effort to implement those instructions was met consistently by Soviet resistance. And, in the end, we withdrew from the negotiating table language that would clearly have obligated the Soviets to the narrow interpretation.

I think the language that was withdrawn from the table and the substitutes that represented a compromise which came ultimately to replace them are the key documentation that one needs to examine.

If the question is, why did our negotiators believe that they had succeeded where we, who have now examined the record, believe they had failed, I can only say that when one gets caught up in a negotiation—and I think we have all had this experience—there is a strong desire to believe that one has prevailed and it is not always the case when you take a cool and reflective look at the negotiation record itself.

Chairman **Pell**. In other words, if I understand what you are saying, you believe that the negotiating team that we had there did not reflect accurately the events that transpired at the negotiation.

Mr. **Perle**. I think they did not come to a conclusion that is supported by the negotiating record. If I may say so, I would not want to be misinterpreted as suggesting in any way that there is bad faith involved in this. I think one gets caught up in a negotiation. One likes to believe one has succeeded. One remembers selectively.

But when you lay out this record and you see the contests that went on between the American view, which was restrictive, and the Soviet view that was broad, I think it is clear that we did not prevail in persuading the Soviets to accept what we now call the restrictive or narrow interpretation.

Chairman **Pell**. Ambassador Nitze, who was not the chairman of the negotiating team, came back with a different view, is that not correct?

Mr. **Perle**. Well, he did not say much at the time on this particular subject. But I know that, having looked at the record, his view today is that the broad interpretation is fully justified.

Judge **Sofaer**. May I add a word here about Ambassador Nitze?

Chairman **Pell**. Judge Sofaer.

Judge **Sofaer**. When I started this work, Mr. Chairman, I worked with Ambassador Nitze. I did this work of mine under his direct supervision, in effect. He is not a lawyer, and I bear responsibility for the legal memorandum that has been filed with the Senate.

But he had thought that they had pinned down the Soviet Union to the narrow interpretation. We went through the documents one by one. We sat together for hours on this issue. You have to remember who you are dealing with here. You are not dealing with the United Kingdom or some ally with which we can have agreements that can be a little more vague and feel that they are enforceable. But in dealing with the Soviet Union, with its record of not letting us get away with anything and keeping all their options open, by that standard he concluded that we had not bound them to the narrow interpretation.

Chairman **Pell**. Thank you.

I have one further question here, Judge Sofaer, and that is this. In your review of the negotiating record, did you consult with any members of the negotiating team other than Mr. Nitze?

Judge **Sofaer**. That has come up repeatedly, Mr. Chairman, and I appreciate a chance to say something about that.

Chairman **Pell**. Good.

Judge **Sofaer**. First of all, as a new lawyer in the State Department, it was pretty important for me just to be working with Ambassador Nitze. I happen to think that he is a great American and a person that I could confidently work with.

Chairman PELL. There is no argument with that. But it is not answering my question.

Judge SOFAER. I am just explaining. He was there.

In addition to that, I had available to me the 1985 study by Graybeal and Fitzgerald, who were at the negotiation and who wrote a long and detailed study taking the narrow position, which is also on file with the Senate.

In addition to that, I had Ambassador Smith's book, and I debated him. I had Rhinelander's book and I debated him. So I did have the views of these negotiators.

Let me just say, Mr. Chairman, I agree with the idea that we should enter into a more intensive and meaningful communication with the negotiating team, and I hope that they will agree to do that with us.

As these studies are going to be completed, I am recommending that we do that.

Chairman PELL. Thank you very much. You are only 10 feet away from the former head of the negotiating team. So maybe you could work out a little rendezvous over the luncheon table.

Judge SOFAER. I think we get along quite well on a personal basis.

Chairman PELL. Thank you.

My time has expired.

Senator Helms.

Senator HELMS. Thank you, Mr. Chairman.

It would also help if Senators would know what they are voting on. This illustrates more than anything that I have experienced thus far that the Senators simply did not understand what the treaty was all about. They were voting for a title. It sounded good. The press was demanding that this be approved, and all the rest of it.

But, in any case, I think Senator Thurmond has sized up the meaning and the purpose of this premature hearing today.

Just to illustrate the ambiguity and the vagueness of what goes on, let me ask Mr. Perle this question.

Last summer, Senator McClure requested that the negotiating record for the SALT I Interim Agreement, which is interlinked to the SALT I—ABM Treaty, be provided to the Senate.

Do you remember that?

Mr. PERLE. Yes, indeed.

Senator HELMS. He wanted it provided to the Senate at the same time the ABM Treaty negotiating record was provided.

The State Department refused. Is that correct?

Mr. PERLE. I believe that is right.

Senator HELMS. That's right.

It has even been suggested that the Nixon administration misled the Senate in 1972 over whether the Soviets had agreed to prohibit research and development and testing of ABM systems based on new physical principles.

Let me ask you, Mr. Perle, does the interim agreement negotiating record also indicate Soviet negotiating deception and the misleading of the Senate at that time over how to interpret the interim agreement?

Mr. PERLE. I believe it does, Senator Helms. I think there are several instances in which statements made by executive branch witnesses must have led Members of the Senate to believe that the Soviets were obligated in ways that it subsequently developed they were not obligated.

I believe that is true even with respect to the ABM Treaty. I might give you one example.

It was said at the time of the ratification discussion that certain tests which could only be conducted at permitted test ranges would be conducted under the agreement in the case of the United States at White Sands and Kwajalein Island in the Pacific, and in the case of the Soviet Union at Sary Shagan.

We subsequently, after the treaty was ratified, saw the Soviets begin the construction of a radar at another location that was not in our understanding an agreed test range. In this particular case, it was at Kamchatka.

If you apply the logic that the chairman of the Judiciary Committee sought to apply a moment ago to that particular provision, you would have to conclude that the treaty had been violated by the Soviet Union or that the statements made by the executive branch upon which the Senate relied had been false statements.

What I believe happened is that the negotiators failed to nail down on a bilateral basis the issue of what constituted an agreed test range.

Senator HELMS. That's right.

Mr. PERLE. And we mistakenly believed that we had done that. It turned out we were deceived, I think quite deliberately, because the Soviets made comments that suggested that the incorrect assumption upon which we were operating was, in fact, correct. This is just one instance.

There are many others, and some of much greater consequence.

Senator HELMS. Of course there were. And, of course, this is the point that the American people need to understand, and they don't understand it.

We hear all of this stuff bashing the President. We bash Rehnquist one week and the President the next, you know.

Let me ask you another question as my time is short.

Does the SALT I Interim Agreement negotiating record indicate that the Soviets SALT negotiators deceived the United States on the issue of whether heavy ICBM's were prohibited from replacing light ICBM's?

Mr. PERLE. Yes, Senator. I believe this is not only the most dramatic instance of Soviet deception, but the one that carried the gravest consequences.

It was one of the more important provisions of the interim agreement, that launchers for light missiles could not be converted into launchers for heavy missiles.

We were unable in the negotiations to get the Soviets to agree to a definition of the terms "heavy" and "light."

There were limitations in the treaty on the extent to which the silos in which missiles were based could be enlarged.

At the time, the Soviets had a new missile, vastly more effective and substantially larger than the light missiles, the launchers for which could not be converted to launchers for heavy missiles. I believe they concealed the testing of that missile until after the interim agreement was signed, and we subsequently, to our dismay, discovered that the light SS-11's were replaced by SS-19 missiles that, by the understanding conveyed to the Senate of the United States would surely have constituted heavy ICBM's.

I know that this was a particular concern because that conversion meant a sixfold increase in the number of Soviet warheads and a very substantial increase in the throw-weight of that ballistic missile force.

We also know, Senator, through what was then an extremely sensitive communications intercept, that, after General Secretary Brezhnev agreed on the issue of the extent to which silos could be enlarged, he became concerned that he might have, thereby, inhibited the substitution of this heavy missile for a light missile, and he got into communications with Marshal Grechko, and we acquired that conversation.

As I recall—and I am working from memory—Brezhnev said to Grechko, "Can we fit the new missile in? I have just agreed to a 15-percent rule." And Grechko said, "I'll have to get back to you." And he did get back to him and he said, "We can fit it in." And Brezhnev said, "Thank God."

It was only at that point—only at that point—that that particular arrangement was consummated.

There is no doubt in my mind that had Marshal Grechko instructed General Secretary Brezhnev that this new missile, one that we would surely have considered heavy, would not have fit in that silo, he would have retracted the position he then had on the table.

Senator **Helms**. Well, I just do not understand how anybody can seriously entertain the thought that we should not have that kind of information under consideration.

Mr. Chairman, I ask unanimous consent that Senator Quayle's letter and statement be printed in the record.

Chairman **Pell**. Without objection.

Senator **Helms**. Thank you.

[The information referred to appears in the appendix.]

Chairman **Biden**. Senator Kennedy.

Senator **Kennedy**. Thank you.

Mr. Perle, I find your characterization of our negotiators to be a very arrogant and self-serving one. Those who were involved in the negotiation—their history, their record, their dedication, and their professionalism—will speak for themselves. But to suggest, as you did this morning, and as you have done in numerous private meetings, that somehow these individuals were so insecure in their achievement that they had to rely upon boasting and misrepresenting, and to state everything but that they willfully and knowingly misled the Senate——

Mr. **Perle**. Those are not my words, Senator.

Senator **Kennedy**. The record will stand about what you have stated about the negotiators. It will stand this morning.

Mr. **Perle**. And it bears no relation to what you have said.

Senator **Kennedy**. For those of us who have listened to you yesterday, it will stand. I am not repeating what you stated there. But those of us who have heard that know exactly what we are talking about.

I hope Max Kampelman has heard it. Mr. Glitman has heard it. Mr. Lehman has heard it. They are on notice, too, so that we can be duly cautioned that someone may charge that Mr. Kampelman is going to come back and that he will somehow state some other position than what our very proud, skillful negotiators have done.

I, for one, resent that deeply. We are limited in time and we will give you a chance to respond.

Did you ever read the 1985 memorandums that Mr. Sofaer prepared?

Mr. PERLE. On the ratification process?

Senator KENNEDY. Yes.

Mr. PERLE. No, sir, I did not.

Senator KENNEDY. You did not. And you are the Assistant Secretary for International Security, whose job it is to advise the Secretary of Defense on these matters, and you did not read that.

Did you read the law review article?

Mr. PERLE. No, I didn't read the law review article.

Senator KENNEDY. You didn't read the law review article, either.

Mr. PERLE. I did, however——

Senator KENNEDY. I'll ask. We have limited time.

Did you read the statements which are over in S-407, that Mr. Sofaer has proposed? Did you read that?

Mr. PERLE. I have read the statements upon which the administration has drawn its conclusions——

Senator KENNEDY. Have you read, in particular, the 85-page memorandum that Mr. Sofaer has submitted?

Mr. PERLE. I have.

Senator KENNEDY. You have read that. But you have not read the other two?

Mr. PERLE. I have not read the other two, and I must say that in my judgment——

Senator KENNEDY. All right. That was my only question.

Mr. PERLE [continuing]. In my judgment, what is critical to the determination——

Senator KENNEDY. Now, as I understand——

Mr. PERLE. Could I respond, Senator, but I think you leave——

Senator KENNEDY. You can, but on your own time.

Senator THURMOND. Mr. Chairman, I think he is entitled to respond to the questions.

Senator KENNEDY. He has responded to my questions as far as I am concerned. If he wants to, he can respond afterward.

Senator THURMOND. Well, let him finish his answer.

Mr. PERLE. I am willing to wait if I can have an opportunity to respond.

Senator KENNEDY. Whichever way the Chair wants to proceed.

Chairman PELL. Senator Kennedy has the floor.

Senator KENNEDY. I would like to ask when, Mr. Sofaer, did you first conclude that your October 1985, memorandum did not fairly describe the ratification procedures?

Judge SOFAER. The first clue I got of that was when Senators Levin and Nunn questioned me on November 21, 1985, at a Senate Armed Services Committee hearing, and it was brought to my attention that one of the quotations was not complete. I immediately said that was wrong, and that if I had known that the quotation had been incomplete, I would never have permitted that to happen.

So I got my first clue right then.

Senator **KENNEDY**. When did you discover your law review article was wrong; that is, the sections dealing with the ratification?

Judge **SOFAER**. I told my people to make sure the quotes were complete at that point and to make sure there were no errors of that sort in that law review article.

Senator **KENNEDY**. Have you read the ratification record today?

Judge **SOFAER**. I have, yes, sir—the entire record, including the classified portions.

Senator **KENNEDY**. So, the Nunn letter, which refers to whether you had or have not read it, you have done that now?

Judge **SOFAER**. I have, sir.

Senator **KENNEDY**. When was that done?

Judge **SOFAER**. I have done it over the last 3 weeks.

Senator **KENNEDY**. In the last 3 weeks.

I see that my time is up.

Mr. **PERLE**. May I now have an opportunity to respond?

Chairman **BIDEN**. I beg your pardon?

Mr. **PERLE**. May I now have an opportunity to respond? I was told that I could not respond on the Senator's time but that I could respond on my own. Is this now my own time?

Senator **KENNEDY**. I would ask that he be entitled to respond. He responded to Mr. Helms on his own time. He should be able to respond again.

Chairman **BIDEN**. Sure.

Chairman **PELL**. Well, let him respond on his own time.

Chairman **BIDEN**. Please respond.

Mr. **PERLE**. I wished only to make two points, Senator Kennedy. First, I do not share the characterization that you attributed to me.

Senator **THURMOND**. Speak louder so that we can all hear you.

Mr. **PERLE**. I do not share the characterization that Senator Kennedy attributed to me of our negotiating team in 1972.

I said that in my judgment, the team was unsuccessful in obtaining a clear Soviet commitment to what is now referred to as the narrow interpretation, and I believe that if they believed otherwise, they overstated in their own mind the extent to which the Soviets considered themselves bound. And I believe that a careful review of the negotiating record supports that review.

With respect to my reading the ratification record, Senator Kennedy, I lived through that ratification record and I remember it very well, indeed. If I did not rush off to read an article describing it, it is because it is very clearly in my memory. The thing that stands out most clearly is the paucity of discussion on the floor of the U.S. Senate about the issue that is now under discussion. And, indeed, looking back on this treaty——

Senator **KENNEDY**. Not according to Scoop Jackson. He had 13 pages of questions on exotic systems in the record. Thirteen pages——

Mr. **PERLE**. Indeed, I wrote most of those.

Senator **Kennedy** [continuing]. And you wrote most of them, so we ought to mention those. There is no question about Scoop Jackson's views or any fair reading, according to Senator Nunn.

Mr. **Perle**. I think to put into perspective what happened in 1972, the ABM Treaty, which was immensely popular, was approved virtually without serious comment on the floor of the U.S. Senate. No understandings were offered, no clarifications were offered, no reservations were offered. Indeed, the time spent discussing the ABM Treaty on the floor of the U.S. Senate is rather less than the time that Senator Nunn has spent with his recent exegesis.

So, to suggest that it was a salient issue at the time of the ratification, as to how one would interpret Agreed Statement D, which I believe was scarcely known to most of the Senators, virtually all of the Senators who voted on the treaty, would seriously distort the record of what happened in 1972.

Chairman **Biden**. You know, I find that fascinating. I am going to exercise the prerogative of the Chair here. I find that fascinating: The fact that there was not a disagreement because no one suggested there should be a disagreement is now supposed to be evidence of the fact that, in fact, there should have been a disagreement. This I find fascinating.

Mr. **Perle**. Well, I must say that I find fascinating the analogy you sought to make between a secret agreement surrounding obligations under the Panama Canal Treaty, about the rights of passage, which was at the very heart of that treaty.

Senator Biden, if it had occurred to any Senator that this was an important issue—and if you read the record, even the ratification record, you will find different statements by different administration spokesmen. You will find statements for the record that differ with statements said in the hearing itself. You will find vagueness and ambiguity throughout. And if any Senator had been sufficiently concerned with respect to the treatment of systems based on other physical principles tested in space, one would think this would have been the subject of debate and discussion on the floor of the U.S. Senate——

Chairman **Biden**. It did occur.

Mr. **Perle** [continuing]. Or possibly an understanding or a reservation. But none of that took place.

Chairman **Biden**. The reason why there was no formal understanding necessary is because everyone agreed on the interpretation although Senator Buckley and Allen reached a different conclusion about the desirability of the Treaty based on that interpretation. The rest of the Senate drew a different conclusion.

Mr. **Perle**. I do not wish to be disrespectful to the institution as it is one that I admire greatly, but I think I have to say to you, Senator——

Senator **Kennedy**. Just like our negotiators.

Mr. **Perle** [continuing]. That the attention of the Senate was not focused on the details of the ABM Treaty in 1972. That treaty was ratified before President Nixon left Moscow.

Chairman **Biden**. Let me just make sure that I understand one point.

You said that you disagreed with Senator Kennedy's characterization of your characterization of the negotiators, and, as you restated it, you said that they did not deliberately misinterpret, they just came away thinking something different than what really happened. Is that right?

Mr. PERLE. I believe there was ambiguity in the record. I also believe that from time to time that ambiguity was acknowledged by the negotiators themselves——

JUDGE SOFAER. I think the record is clear——

Mr. PERLE [continuing]. But was not fully reflected, the ambiguity was not fully reflected in presentations made to the Senate of the United States.

Chairman BIDEN. And why do you think it was not reflected?

Mr. PERLE. I have seen documents, Senator Biden, written by the individuals you are talking about, in which they themselves raise the question of whether the Soviets agree with the interpretation that is now called the "narrow interpretation." So, they were aware of the fact that this was less than clear and chose, for whatever reason, not to open that issue in the course of the ratification proceedings—I rather suspect because they hoped that the Soviets would somehow be bound if the issue was not thoroughly ventilated.

Chairman BIDEN. So, they are either one of three things. They were very naive, or they were deliberately misrepresenting, or they were stupid, according to you. It had to be one of the three.

Mr. PERLE. Well, I prefer to describe what happened rather than characterize the individuals, which, it seems to me, is a fairer way to proceed.

Chairman BIDEN. I apologize to my colleagues for this time and would yield to my colleague from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman.

There will doubtless be considerable debate as to whether the Senate in 1972 focused on the broad or narrow interpretation issue. But, Judge Sofaer, I would like to go to a couple of statements in your testimony which I think get us into very, very deep water in terms of what the ratification process means.

We have two parties to a treaty, the party of the first part, the United States, and the party of the second part, the Soviet Union, and the intent, constituting the party of the first part, is what the executive branch enters into and what the Senate ratifies. You say in your statement on page 31 that the Senate should not adopt rules that would, in effect, enable executive officers to transform for the United States the treaty obligations actually negotiated.

Are you saying that if executive officers come and make representations in open hearings to the Senate and those representations are wrong, and the Senate acts on those representations, that those representations have no effect on what the treaty really means?

Judge SOFAER. No, I am not saying that.

I am saying that the resolution that has been proposed would treat that representation and the Senate's acquiescence, as the resolution is worded, as a definitive interpretation of the treaty for the purpose of the United States and, thereby, bind the United

States to a meaning of the treaty that may not necessarily be the meaning to which the other nation is bound.

Senator **Specter**. Well, what does the Senate have to go on besides the representations made by the executive branch at the ratification hearings?

Judge **Sofaer**. Well, the Senate can get information about an issue. They can ask for instructions and they can ask for the negotiating record. They can ask for further explanations.

In the case of the Panama Canal Treaty, they got explanations from the executive branch as to each of the issues. The legal adviser's office drew them up.

In the case of the ABM Treaty——

Senator **Specter**. Well, Judge Sofaer, we do not have too much time.

The Senate can do that. The Senate can do a lot of things. It is hard to get Senators at hearings, let alone to get Senators to go to the negotiating record, and, in most cases, the negotiating record is not available. It is now available in S-407, and we have referred to that a number of times.

This is a big issue before the Senate, and you can count the Senators who have seen the negotiating record on your fingers.

So the question is really, in a practical sense, Can we function in a system where the Senate cannot rely on representations made by executive officers?

Judge **Sofaer**. I think, generally speaking, the Senate can rely on representations made by executive officers. Sometimes those representations will be mistaken or misleading. It will happen, and errors do occur—witness my own case, which I regret. The fact is that there was an error. It happens.

Now, when that happens, I am not saying, Senator Specter, that a statement of that sort should not be evidence that is considered. Of course it should be. And the reaction of the other country is relevant to that. But what the resolution would do is give such statement binding effect because it would become what the Senate acquiesces in.

Senator **Specter**. Well, the difficulty that I have with the proposition, Judge Sofaer, is that if the Executive has negotiated one thing with the other party, the Soviet Union, and then makes a misrepresentation to the Senate, then there really is no meeting of the minds, because the intent of the party of the first part has two sections—what the Executive does and what the Senate ratifies. If we are on different tracks there, do you have any treaty at all?

Judge **Sofaer**. Well, I think that notion of the meeting of the minds is something that does not apply, as such, to international agreements the way it does to a normal domestic contract.

Senator **Specter**. But, wait a minute. You talk about mutuality of obligations.

Judge **Sofaer**. Yes.

Senator **Specter**. That is a paraphrase for "meeting of the minds."

Judge **Sofaer**. Well, there has to be mutuality of obligation.

Senator **Specter**. Isn't that the same thing as meeting of the minds?

Judge **Sofaer**. Not always. "Meeting of the minds" can mean more, in the way you are using it.

Senator **Specter**. Or it can mean less.

Judge **Sofaer**. What we would say is that the ratification documents that are communicated to the Soviet Union, and both nations communicate these ratification documents, result in a binding treaty.

Then there is an issue as to what that treaty means. We cannot successfully assert to the Soviet Union that the treaty means what an executive officer got up in the Senate Armed Services Committee and said it meant. We just cannot successfully do that. That does not mean there is not a treaty. There is a treaty.

But it is a treaty that is different from the one that that executive officer asserted, and that will occur sometimes.

Senator **Specter**. Mr. Chairman, may I ask one further question of Secretary Perle?

Chairman **Biden**. Yes, go ahead.

Senator **Specter**. I have quite a few more questions, but the time is limited.

I would like to ask you, Secretary Perle, this question.

In your response to earlier queries relating to the difference in fact from what was represented to the U.S. Senate, when you responded to Senator Helms' questions, in any of those cases, was there any chance that the representations made by the executive branch to the Senate were deliberately misleading?

Mr. **Perle**. I don't think I would characterize them as deliberately misleading.

What I think is true is that in every case with which I am familiar, in which statements of the American view of the treaty were violated by the Soviets—and there are several such instances—where it could not be shown that there existed a bilateral agreement with the Soviets covering that issue, the United States concluded that it did not have the legal basis upon which to charge the Soviets with a violation.

Senator **Specter**. So there were errors, really, made where United States negotiators thought they had a deal—they made that representation to the Senate, and when you went over the fine print, the United States negotiators really had not extracted those specific commitments from the Soviets?

Mr. **Perle**. There were even instances in which our negotiators understood that they had not nailed down the details, so they presented to the Senate the American view.

For example——

Senator **Specter**. Wait a minute. If you are saying that they knew that they had not nailed down those Soviet commitments, then that is deliberately misleading.

Mr. **Perle**. No. That was acknowledged.

Senator **Specter**. Acknowledged where—before the Senate?

Mr. **Perle**. It was acknowledged before the Senate, and along with the acknowledgement there was an assertion that the United States would consider, if the Soviets did certain things that that would constitute a violation.

The Soviets did those things and we did not consider that it constituted a violation because, on reflection, we acknowledged that no bilateral agreement binding on the Soviet Union had existed.

Senator **Specter**. So, you are saying that in those cases, the Senate was on notice that we really did not have a binding deal and we were just taking our chances?

Mr. **Perle**. That's right.

There were some other unpleasant surprises, and I alluded to one earlier, which was the expectation which the Senate had every right to consider, that the Soviets had only one agreed test range and it turned out they asserted that they had more than that, and there was nothing we could do about it.

Could I just add one thing?

I want to be very careful. Looking at the negotiating record, I think it is fair to say that the negotiators were, on the whole, rather more careful in the way they stated what had been agreed in the course of the negotiations than some other officials of the administration at the time.

Other officials of the administration, who were not present in the negotiations, had to rely on a bureaucratic process by which guidance was issued. And if one looks at the statements during the ratification process that appear to be the most compelling and the clearest statements of the narrow interpretation of the treaty, those, for the most part, are statements made by officials other than the negotiators themselves, who, in turn, had to rely on the opinions of others as to what the treaty meant.

Senator **Thurmond**. Mr. Chairman, I have two questions. Could they be answered for the record?

Chairman **Biden**. Surely, Senator Thurmond. No problem.

I would yield to Senator Leahy with the comment that really what is at stake here is domestic law, the Constitution of the United States of America, and not international law. But we will get to that later. I will yield to Senator Leahy.

Judge **Sofaer**. Both are at stake.

Chairman **Biden**. The Constitution first. That is the only law that the President is bound by.

Senator **Leahy**.

Senator **Leahy**. Thank you, Mr. Chairman.

I was concerned about Judge Sofaer's statement, the implication, that we should not pay much attention to the executive branch, and that does, of course, include the President.

I think, Messers Chairmen, I want to commend you for holding these hearings.

The ABM Treaty is the only meaningful agreement now in existence between the United States and the Soviet Union limiting the nuclear arms race. I think that we have a special duty in the Senate to make sure that it is not trashed by the administration, which has trashed virtually every other gain in the arms control process over the past 15 years. It has have done it with SALT II and now apparently it is doing it with ABM. We have made very little gains on the issue of chemical weapons, and now we face a very serious problem in parts of the world because of that.

And that is precisely what I believe the administration is after in this so-called treaty interpretation debate. They want to do away with the ABM Treaty.

Until late 1985, nobody questioned what the treaty allowed or prohibited. It allowed each side 1 ABM site with up to 100 fixed, ground-based launchers. It allowed research into ABM technologies. It allowed modernization of fixed, ground-based ABM systems. It prohibited everything else, period. That was it.

I don't think anybody questioned that.

Mr. PERLE. I think if you ask the negotiators, they will question that.

Senator LEAHY. No development or testing of mobile, space-based, or sea-based ABM systems or components, whether on "conventional technologies" existing at the time, or so-called exotic or futuristic technologies unless subsequently agreed by the parties—certainly that was the kind of testmony that I heard as a member of the Armed Services Committee. It was the kind of testimony that I have heard consistently on the Appropriations Committee from the administration, from the Department of Defense, and was certainly what I heard consistently in the Intelligence Committee.

Now, I have carefully studied what I think are very important statements by Sam Nunn on the negotiating record. I have looked at the ratification record. I have looked at the subsequent practices of the two parties to the ABM Treaty, which I think are also important.

I have read the exchanges between Senator Levin and you, Judge, and the Secretary of State.

I have looked at the various materials Judge Sofaer has made available about his own reviews of the negotiating record. I have also reviewed statements made by former U.S. officials who negotiated the ABM Treaty.

Judge, with all due respect—and I have listened to you testify in open and closed hearings and have been impressed by your legal abilities—I just wonder how you could allow yourself to be a party to what I think is a charade.

Your legal skills have been used to try to rewrite a treaty 15 years after it was signed by the President and after it was advised and consented to by the U.S. Senate.

You have challenged the constitutional role of the Senate to approve not just the words but, even more importantly, the meaning of a solemn international agreement.

You have become a party to an effort within the administation to revise the whole U.S. nuclear deterrence strategy, built up over 40 years of bipartisan experience, and make a leap into the unknown without the kind of study and debate and formation of a national consensus that this, the most powerful Nation in the world, should have before it acts.

Mr. Chairman, the Defense Subcommittee of Appropriations just had a hearing with General Abrahamson. He presented the SDI budget request for fiscal years 1988 and 1989. What he said bears on this hearing today.

He outlined a pronounced shift in SDI funding priorities away from broad research of technologies intended to protect population, which is what the President said was the goal of SDI, toward an emphasis on technologies for early deployment of a limited space-based defense.

I must compliment you, Judge Sofaer, on the coordination—trash the ABM Treaty, remove the longstanding interpretation, and then come to the Appropriations Committee to change American policy no matter what we are saying.

That is what is happening here.

Thank you, Mr. Chairman.

Judge **Sofaer**. Senator, I would like to respond at least to those remarks that suggest that——

Senator **Leahy**. You are on your time and you can say all that you want now.

Judge **Sofaer** [continuing]. I am using my legal talents as part of a charade, to which I have to take exception.

I regret that you feel that way, Senator.

The fact is that part of the work that came out of my office, and for which I accept responsibility, was inadequate, and it may have led people to jump to that conclusion too soon.

I would suggest that if you look at the negotiating record study, and furthermore at the rest of the work that we turn out, you will see that there are very substantial and real questions that have to be looked at in connection with this issue of what the ABM Treaty means.

Whether you will find, or whether even the President will find, the evidence sufficient to warrant the restructuring of the program to the broader interpretation is for you to decide and for him to decide. I can only assure you that the negotiating record, which we looked at first because we would not have even begun to go beyond that point if it were clear, has some extraordinary evidence in it of the fact that we did not bind the Soviet Union to the narrow interpretation.

Indeed, there are many memos—and they are continuing to turn up, Senator, out of the boxes that are arriving in my office from various storage facilities—that reflect that there have been doubts in the administration, both before and after 1972, whether we had bound the Soviet Union to the narrow view or, indeed, to the view of nondeployment.

There have been doubts. So the issue is legitimate to look at.

I only ask you to look at it and judge it for yourself on the basis of an objective reading.

Senator **Leahy**. Judge Sofaer, I understand. I have heard you quoted in the press about how this was done by a young lawyer who slipped something by everybody. Let me tell you, that claim has been gleefully latched onto by the administration. The performance before the Appropriations Committee by General Abrahamson shows the Department of Defense is hanging on to that like a lifeline.

For all nameless young lawyers, let me stand up and say to you, too, have your day in the limelight and you, too, serve your country.

Judge **Sofaer**. Well, I will tell a story, Senator, that Justice Jackson tells in a concurring opinion in *McGrath* v. *Christianson,* when he overruled an opinion that he had written as Attorney General.

He said that he knew that it would strike the reader as peculiar that he would have written such an earlier opinion as Attorney General when he had argued a case in the Supreme Court bringing to its attention material that he had overlooked in his Attorney General's opinion.

He said, and I will quote from it because it gives me some comfort, "It would be charitable to assume that neither the nominal addressee of this opinion nor the nominal author of the opinion read it. But no such confession and avoidance can excuse the then-Attorney General," that is himself.

In other words, Senator, it can happen. And it was a tangential issue at the time. And, just as Senator Jackson said right up front, it happened to me, and then he lists about 10 other situations in which it has happened to people——

Senator **LEAHY**. You mean Judge Jackson.

Judge **SOFAER** [continuing]. Yes, Justice Jackson. Just as Justice Jackson said it happened to him, I said it happened to me. I have never named those young lawyers, and I never mentioned the young lawyers in public. It was mentioned in a private meeting with a Senator that he then took to the floor.

I have always taken responsibility for that glitch, and I hope to make up for it.

Senator **LEAHY**. Well, you ought to name them because the way the administration has been using them, they are probably going to get medals anyway. [Laughter.]

Mr. **PERLE**. If I could set the record straight on one point, Senator Leahy, no decision of the Department of Defense, no decision by General Abrahamson, no element of the SDI Program has been affected in any way by the memorandum to which you refer. The notion that some use is being made of a memo that deals only with the ratification process and not with the obligations assumed by the parties at the time the treaty was negotiated is just completely wrong.

Chairman **BIDEN**. That seems to be accurate, since you acknowledge you never read them anyway. [Laughter.]

The Senator from New Hampshire.

Senator **HUMPHREY**. Thank you, Mr. Chairman.

How much time are we allowed?

Chairman **BIDEN**. As much as you need. Oh, I shouldn't say that. I would yield to my colleague on this. It is supposedly 5 minutes, but, in fairness, we have not adhered very strictly to that rule for others. And since New Hampshire is becoming an increasingly important state in my mind, I am not going to worry about it, and will not object.

Chairman **PELL**. But let me say that we do have more witnesses to follow this panel.

Senator **HUMPHREY**. Fine.

What an interesting and unfortunate irony that the administration, which gave birth to the strategic defense initiative, has delivered it into the hands of murderous midwives.

President Reagan's greatest accomplishment in defense and foreign policy might well be strangled in its crib by those who wish it ill. And the President will have no one to blame but himself, for, in saying one thing about the ABM Treaty and doing another, the

President is losing the opportunity to rally the American people to the side of SDI.

By saying that the ABM Treaty permits testing and deployment of SDI while at the same time constraining testing and development, the President leaves the American people confused.

The President says the broad interpretation of the treaty is correct, but we will abide by the narrow, incorrect, interpretation. The American people yawn.

He fails to arouse his strongest allies to the side of defending the treaty.

By straddling the fence, the President permits the SDI opponents to define the debate. What better example than today's hearing.

If the American people are not more confused and muddled about this issue than before this hearing began, I would be quite surprised.

Where there should be a grand debate about the advantages of providing the Western Alliance a defense against ballistic missiles, we have a lawyer's debate of a very confused negotiating and ratification record. And no amount of argument will ever settle the question which is correct.

When Sam Nunn and Fritz Hollings, two of the staunchest Democrat supporters of a strong national defense take diametrically opposed positions, there is little hope of proving one or the other wrong to the satisfaction of the American people.

When, after careful research, these Senators come to opposite conclusions about what the ABM Treaty means, reasonable Americans conclude the terms of the treaty and associated documents must be ambiguous. While lawyers and politicians and diplomats here in Washington dance their dainty minuet, Moscow builds massive battle-management ABM radars.

While we jerry-rig SDI tests to keep them within the limits of the narrow interpretation, the Soviets boldly prepare for a breakout from the ABM Treaty in the early 1990's.

The President's opponents are not satisfied merely to confuse the issue further. They are now moving to pass a resolution that would have the effect of hobbling an upcoming and very important strategic defense initiative test. This is the purpose of the Biden resolution, in my opinion, the nominal focus of today's hearing.

President Reagan must rescue SDI. He must wrest the debate from the myopes who lock themselves in musty rooms, poring over the details of a long-ago debate which time and technology have long passed by.

He must wrest the debate from the ghosts of diplomats past, who seek to redeem themselves today to recompense for their failures long ago in Geneva.

He must wrest the debate from madmen, who have come to feel secure in the ghastly and grizzly doctrine of mutually assured destruction.

President Reagan must arouse the American people to the fact of Soviet violations, massive, serious, worrisome, portending violations of the ABM Treaty. He must arouse our people to the uncontestable fact that continued American compliance with the ABM Treaty was conditioned long ago on securing reductions in Soviet strategic weapons, which reductions the Soviets have obstinately refused.

The President must argue that America's best options for security, peace, and stability lie outside the ABM Treaty. Each party to the treaty has the right to withdraw upon due notice. President Reagan must ask the American people to support withdrawal.

Continued coyness on his part will kill SDI. The President must stop hiding in the shadows of equivocation. It is time for the President to lead on this issue for, if he does not, SDI, as a practical option is dead.

Now, Mr. Chairman, I want to refer to Senate Resolution 167.

Mr. Perle, have you familiarized yourself with the Biden resolution?

Mr. PERLE. Yes.

Senator HUMPHREY. The effect, if I understand it correctly, is to find and to resolve that the treaty means what the Senate understood it to mean at the time of the interpretation. Is that a fair assessment of your analysis?

Mr. PERLE. Well, what some Senators may have thought the treaty meant at the time.

Senator HUMPHREY. Yes. All right.

Let's go to the effect, because that is the important thing.

The effect would be, and the chairman of the Judiciary Committee so acknowledged in his remarks upon the introduction of this resolution on the floor a few days ago, the effect would be to hobble, to curb, to make difficult, to damage an upcoming test in the SDI Program. Is that not correct?

Mr. PERLE. I believe it is aimed at killing the SDI Program and, worse than that, if I may say so, the ricochet would do such damage to the Constitution and to the ability of the United States to enter into agreements with other countries, that I cannot imagine this resolution would pass the Senate.

Senator HUMPHREY. To what extent are you free, Mr. Secretary, to talk about this upcoming test, which, in your opinion, and mine——

Chairman PELL. I must ask that this be the Senator's last question.

Senator HUMPHREY [continuing]. The Biden resolution, if followed by the administration, would prevent?

Mr. PERLE. Senator, I do not believe there is a specific test, the conduct of which depends on one interpretation or the other, because there are ways in which tests can be made to conform to the narrow interpretatin.

Senator HUMPHREY. But as the test is now planned, would it be affected by this resolution?

Mr. PERLE. I do not believe there is now a test planned that would be affected by the resolution, because the President is still considering availing the United States of what we believe to be its rights under the treaty. This hearing and other consultations are part of the process of attempting to achieve some understanding with the Senate of the United States so that that might go forward.

But it is always possible to configure a test in order to remain within the narrow interpretation of the treaty. The consequence of doing so is to add greatly to the costs and to diminish greatly the effectiveness of the test, the knowledge that can be obtained by it, and, therefore, ultimately the demonstration of feasibility that we think is essential to a well-managed SDI Program.

Chairman **Pell**. Thank you very much.

Senator Kerry.

Senator **Kerry**. Thank you, Mr. Chairman.

Judge Sofaer, let me go back to the original area where I had focused.

The secret record, the negotiating record per se, did not really exist as an assembled record at the time you testified in November 1985, before the Armed Services Committee. It was various documents, various memorandums that were in various places. But it was not pulled together as a per se negotiating record.

Is that not correct?

Judge **Sofaer**. No, that is not correct.

I think ACDA has a——

Senator **Kerry**. Excuse me, but you said that. I have the hearing record right here [indicating]. You said there was not one per se.

Judge **Sofaer**. Oh, I see what you mean—a total accumulation, a total collection. There still isn't.

Senator **Kerry**. Right. There still is not. Correct.

So, in 1972, when it came before the Senate, it is accurate to say there was no negotiating record that could have been or, more importantly, was put in front of the Senate. Is that correct?

Judge **Sofaer**. Well, as to "could have been," no. As to "was," yes. It was not put before the Senate. But it could have been put before the Senate.

Senator **Kerry**. It only could have been if the collecting process took place, if it were put together as a negotiating record.

Judge **Sofaer**. Well, there were many documents, Senator, right at that time—and I am collecting them now——

Senator **Kerry**. That's correct.

Judge **Sofaer** [continuing]. That would have made this issue——

Senator **Kerry**. The answer is there was no one collection in 1972. Isn't that correct? I mean, that is the answer, as you have just said.

Judge **Sofaer**. I think ACDA had a collection at that time, and it probably would have been easier then than now to put your hands on everything.

Senator **Kerry**. But it was not there in front of the Senate. I mean, this is very simple stuff. Was it or wasn't it in front of the Senate?

Judge **Sofaer**. Well, it was not because the requests for it were not pressed by the Senators.

Senator **Kerry**. But you just said that you are still collecting it now, aren't you?

Judge **Sofaer**. Out of storage houses and everything else, yes.

Senator **Kerry**. Correct. And at that point in time, it had not been pulled together; correct?

Judge **Sofaer**. Well, I don't know, Senator. I would think at that point in time it was right there in the current files of ACDA. The cables and the instructions could have been produced.

Senator **Kerry**. But they weren't.

Judge SOFAER. Secretary Rogers did not say that he couldn't produce the cables in response to Senator Cooper's request and Senator Fulbright's requests.

Senator KERRY. Well, we are playing the most incredible game here.

Indeed, it could have been. Of course, if the requests had been pressed, they could have.

Judge SOFAER. Right.

Senator KERRY. But they were in various places.

The point I am making is that there was no one document in S-407 that Senators could go up to and refer to as "the negotiating record," correct?

Judge SOFAER. Absolutely.

Senator KERRY. OK.

Now, what was put in front of the Senate in 1972? Let me refer specifically to your comments earlier, when you said the Executive could tell the Senate what a treaty meant. You said that today, correct?

Judge SOFAER. Yes, sir.

Senator KERRY. And the Executive had an opportunity to tell the Senate how to interpret the treaty of 1972, didn't it?

Judge SOFAER. Yes.

Senator KERRY. And it did so by sending specifically the treaty itself, document one, it sent the agreed statements; correct?

Judge SOFAER. Yes.

Senator KERRY. It sent the unilateral statements.

Judge SOFAER. [Nods affirmatively.]

Senator KERRY. It sent the letter of transmittal.

Judge SOFAER. [Nods affirmatively.]

Senator KERRY. And it sent the Rogers report to the President.

Judge SOFAER. Precisely.

Senator KERRY. Those are the items that were before the U.S. Senate. That was the communication of the Executive to tell us what the treaty meant. Correct?

Judge SOFAER. Yes, sir.

Senator KERRY. The Senate then proceeded to work.

Now, Senator Nunn's conclusions—and I think everybody is agreed that there is no more studious, cautious, and concerned person with respect to the defense of this country—Senator Nunn says, and I quote: "The record clearly demonstrates that the key figures in the Senate debate, Senators Jackson, Buckley, Goldwater, Thurmond,"—who was here—"Cooper, and Sparkman, understood that the development, testing, and deployment of space-based exotics was not permitted under the treaty."

He then talks about and says, "Moreover, there was clearly a perception that the Senate and the ratification hearings had served a crucial function in clarifying the treaty's terms. Senator Jackson commented on this during his final speech on the treaty."

I suspect you may have written that speech, Mr. Secretary.

Mr. PERLE. I think that was a speech principally about the interim agreement, to which he devoted a great deal of attention.

Senator KERRY. Senator Jackson noted in that speech that in the extensive hearings in the Armed Services Committee, there were, and I quote, literally "hundreds of questions," and he said, "I hope that as we begin our consideration of the agreement, the terms of them are at least firmly in place."

Mr. **Perle**. The agreement, not the treaty.

Senator **Kerry**. Now, the final conclusion: Senator Nunn says, "At no point during the proceedings did any executive branch witness"—any executive branch witness—"or Senator say, 'No, that interpretation is wrong, the treaty does not prohibit such testing.' Indeed, during the printed discussions of exotics involving the distinction between fixed, land-based ABM's and mobile ABM's, not one witness or Senator ever stated that deployment or testing of mobile, space-based exotics was permitted."

Now, do you have one statement, Judge, that you could put in front of us of a Senator or a member of the executive who were defining it that specifically says they were permitted? Do you have one?

Judge **Sofaer**. Well, in the way that Senator Nunn put it, let me say that I don't think——

Senator **Kerry**. Answer my question.

Do you have one statement that says by a Senator or a member of the Executive that it is permitted?

Judge **Sofaer**. What's permitted?

Ambassador Smith made a statement in his——

Senator **Kerry**. That development and testing of mobile, or space-based exotics is permitted.

Judge **Sofaer**. Affirmatively, in those words; no.

Senator **Kerry**. And I think this is the critical thing. You may say that the President has not created a constitutional crisis, and that may be accurate. Maybe you have. Maybe your memorandum has, because you put in front of us a choice that is very unfortunate. I want to get at it.

I was interested that you quoted Justice Jackson. Are you familiar with the *Schwegman* case?

Judge **Sofaer**. Tell me about it, sir.

Senator **Kerry**. The *Schwegman* v. *Calvert Distillers,* a Supreme Court case, 1951. Justice Robert Jackson, whom you just took succor with, said very clearly that secret legislative history, history not generally available and not part of what Congress voted upon when it passed a statute, could not be relied on subsequently. Indeed, the Federal courts always have said that with respect to interpretation, that you are not permitted to make use of a subsequent interpretation of a law by any legislative entity after the law's passage.

Now, tell me how, constitutionally, you could now have after 10 years an executive come back and tell us that the legally correct meaning of the treaty is totally different from anything that was in front of the Senate and from the understanding of the Senate when it voted into law that treaty? How do we do that constitutionally?

Chairman **Pell**. I must remind the Senator that his time has expired. So after the answer, we will have to move to another Senator.

Judge **Sofaer**. I hope we get a chance to talk about this after I have done my study of the ratification process. But I will say this, Senator. When a treaty is presented to the Senate, not everything that is relevant to the interpretation of that treaty will ever be presented with it.

So, in the sense that you are using "secret," there will always be secret material relating to a treaty that will always be relevant and always be permissible to consider by people who later want to study the treaty.

Senator KERRY. Judge, respectfully, you really are not answering my question.

Judge SOFAER. I think I am, Senator, if you would let me go on. You can make your judgment as to my answer, but let me finish it.

Senator KERRY. Well, the first part of it I find difficult.

Judge SOFAER. The fact is that, even though he was asked for the negotiating record—and I give this to you by way of example—Secretary Rogers said, essentially, to Senators Cooper and Fulbright, you don't really need it. There are not any real issues of difficulty for you to look at. There are a whole bunch of memos and cables and you don't need to see it.

And then he said if questions of interpretation arise in the future, we certainly will go back and look at the memorandums because there wasn't a complete transcript kept of the plenary sessions.

In other words, even in connection with the ABM Treaty, it was clear that the uniform practice of the United States was articulated to the Senate, that is, that if doubts arise about a treaty and the meaning of its provisions, we will go back and look at the memorandums of conversation that we had with our treaty partner.

So, the answer, Senator Kerry, is "yes, the Senate can adopt a treaty on which, in some respects, it has not heard about the meaning of certain issues." That happens every day.

When you adopt a treaty, you adopt with it all of the supplementary materials that can be considered, and all the "context" that can be considered under the Vienna Convention.

Senator KERRY. I know my time is up.

Chairman BIDEN. Take my time.

Senator KERRY. My only comment is that, as you have said, this procedure arises only when the meaning has not been before them. Senator Kennedy has today raised the point that the meaning was very clearly before them: Senator Jackson's pages of questions, Senator Goldwater's, Secretary Laird's very clearly addressed in specific terms the prohibition you seek to assert there was a different interpretation of.

So, indeed, if there had been no discussion of exotics, if there had been no discussion whatsoever about the possibility of future space-based, or other kinds of laser research, perhaps we might argue about what you are saying.

But, given the fact that each and every one of those pieces was adequately put before the Senate because committees are the Senate in that process, there is not any question.

It is clear.

And, as Senator Nunn said, there is not one Senator or one executive official who disagreed with what was put in front of them with respect to that.

Mr. PERLE. That's not correct, Senator.

Senator KERRY. Who is it? Who is it?

Mr. PERLE. I think if you read through the statements——

Senator KERRY. I have read through the entire record. Tell me who it is.

Mr. PERLE [continuing]. You will find a number of contradictory statements.

Senator KERRY. Mr. Secretary, where are they.

Mr. PERLE. You will find witnesses changing their statements.

Senator KERRY. Who are they? Show them to me.

Mr. PERLE. Well, for example, General Palmer.

Senator KERRY. I have the Palmer statements here. What did he say? What did he say?

Mr. PERLE. If you read the discussion with General Palmer, you will find that he begins by saying that research and development is prohibited, and he is then, through the course of a colloquy with Senator Jackson and others, led to change his statement.

Senator KERRY Correct. His ultimate conclusion was different. Right.

Mr. PERLE. He ultimately revised his statement again. And I think if you read through this hearing with any sensitivity to what was going on at the time, you will conclude that there was a great deal of confusion and a great deal of ambiguity, and that is, in turn, reflected in the negotiating record between the United States and the Soviet negotiators.

Senator KERRY. I am astonished by your latter comment. Let me just say that I think I have read it carefully and I think I have read it sensitively. I have the Palmer statements right in front of me, here. General Palmer says the Chiefs were aware of that and had agreed to that. That was a fundamental part of the final agreement.

Senator Jackson pressed him, and Senator Jackson concluded himself that exotics were not permitted, even after that.

Correct?

Mr. PERLE. He did, indeed, come to that conclusion. As a matter of fact, I think General Palmer learned of that through the colloquy with Senator Jackson.

The point I am trying to make is——

Senator KERRY. I see a head in the audience shaking. I think we are going to get a different opionion later as to that.

Mr. PERLE [continuing]. If you look at page 440 of the hearings held by the Senate Armed Services Committee, you will see that, initially, in addressing this issue, General Palmer says the treaty, and I am quoting, "as you have just read, does limit radars, launchers and missiles. It does not limit R&D on futuristic systems. We could not deploy such a new system, however."

Senator KERRY. That's correct. But it doesn't——

Mr. PERLE. Now, it takes a long discussion between them before General Palmer amends his remark. And I think what this illustrates——

Chairman BIDEN. He does not amend his remark. He was correct when he stated it.

Senator KERRY. That's correct. I agree with that comment. But this is one of those "dot, dot, dots, 'where we leave out the things that really give it meaning.

Mr. PERLE. I don't think I have left out anything.

Senator **Kerry**. We can pursue lasers. We can pursue all kinds of exotics with respect to fixed land-based.

Mr. **Perle**. Find those words in the treaty, Senator Kerry.

Senator **Kerry**. "Fixed, land-based?"

Mr. **Perle**. Find a statement that says——

Senator **Kerry**. Article V states it about as clearly as anything I have ever read. But you can go further than that.

After the full interpretive discussion that is precisely what Senator Jackson concluded. That whole discussion, the questions of Senator Goldwater, each of them said we cannot have space-based exotics.

Judge **Sofaer**. No.

Senator **Kerry**. Can we have laser exotics?

Judge **Sofaer**. No, that is not what they said, sir.

Senator **Kerry**. Well, I am paraphrasing, but the gist of it was——

Judge **Sofaer**. The great concern of Senator Jackson at the time was can we continue our laser research and development program on a fixed, land-based laser. That was his great concern.

He was concerned a contract had been cancelled.

Senator **Kerry**. I agree. But the discussion was as to fixed, land-based laser.

Judge **Sofaer**. Right.

Senator **Kerry**. Now, fixed, land-based was specifically permitted in the treaty. What was not was air-based, mobile-based, sea-based, space-based. And that is the distinction. That is where they came out.

Judge **Sofaer**. Well, that is the question. What does Agreed Statement D mean?

I look forward to a discussion after my report on this issue. It is very complicated, I can tell you.

Chairman **Biden**. John, maybe you could go into another subject.

Senator **Kerry**. This is the same thing. I just want to finish and then I will leave.

I appreciate your indulgence, Judge.

Chairman **Biden**. No, don't leave. We want you to stay.

Senator **Kerry**. You keep commenting about your next report and the full report, et cetera. I am frankly disturbed by that. I have had discussions with Senators on the Armed Services Committee and others.

You testified on November 5 or 6, 1985, and that is when you submitted a memorandum. You said at the time in answer to a question from Senator Warner, you said, "Mr. Chairman, I am happy you raised that question. I do not accept that characterization of the restrictive view. My office has prepared a memorandum demonstrating that the so-called restrictive interpretation cannot be regarded as having been authoritatively accepted and adopted by the U.S. Government."

On the contrary, I quote: "Judge Sofaer: Nearly all U.S. Government explanations of the treaty during the ratification period are consistent with the broader interpretation." This is significant since those statements were closer in time. "The restrictive view became common only after the SDI program was announced."

Judge **Sofaer**. Well, part of what I said there is still accurate. But, as I said, I was resting on research that I thought was accurate, and it turned out not to be so.

Senator **Kerry**. Well, let me ask you about that. It was put in on U.S. Department of State, Secretary of State stationery, formally submitted. You were grilled on it by Senator Levin and others.

Why did you, at that time, not say what you have most recently said, which is I do not adopt all of this, or I have not read it, or it is not mine, or young lawyers made mistakes? But you stood by it as the policy.

Judge **Sofaer**. I did not stand by those errors that he brought to my attention.

Senator **Kerry**. At that time?

Judge **Sofaer**. Absolutely. I told him that if there were errors in the quotes, it was wrong.

Senator **Kerry**. But you did not suggest that young lawyers had written this?

Judge **Sofaer**. No. I told him that I thought that the question of the ratification process was one which was of marginal importance when you were discussing the issue of whether the Soviet Union was bound. That is what I told him. So it was not a major matter to me at the time, and, as I have told you here today, I think in connection with an appreciation of the meaning of the ABM Treaty, you have to consider the question of whether anything that was said at the ratification process that you may find impressive and convincing will bind the Soviet Union.

Senator **Kerry**. Is it accurate today to say that nearly all U.S. Government explanations support the broad definition? Is that accurate?

Judge **Sofaer**. Well, I didn't say that.

Senator **Kerry**. I am quoting you. "On the contrary, nearly all U.S. Government explanations of the treaty during the ratification period are consistent with the broader interpretation." Is that accurate?

Judge **Sofaer**. I think it probably is.

Senator **Kerry**. But you haven't given me one statement.

Judge **Sofaer**. Consistent. Senator Nunn makes the point that just because a statement is consistent with the broad interpretation does not mean that it is worth anything. He says that it has to be inconsistent with the narrow interpretation in order to be really valuable. That is a good point. But the fact is that most of those statements were consistent with the broad interpretation.

Senator **Kerry**. Thank you, Judge.

Mr. **Perle**. Did I give you the statement you have been asking for, Senator Kerry? I could direct your attention to an exchange that took place between Ambassador Smith and Senator Margaret Chase Smith of Maine, and I will quote.

Senator **Kerry**. Can you tell me where this is from?

Mr. **Perle**. Yes. It is found in the record of the Armed Services Committee at hearings on page 295 of the volume that covers the hearings of June 6, 20, 22, 28, and into July.

Senator Smith, and I quote, said: "Mr. Ambassador, you say that the treaty prohibits the development of other ABM systems. Would this affect the development of the laser ABM system by the United States?"

Ambassador Smith responded as follows: "Senator Smith, one of the agreed understandings says that if ABM technology is created, based on different physical principles, an ABM system or component based on them can only be deployed if the treaty is amended." Work as to direction, development work, research is not prohibited. But deployment of systems using those new principles in substitution for radars, launchers or interceptors would not be permitted unless both parties agree by amending the treaty.

Senator **Kerry**. I totally agree with that. That is totally consistent with the treaty. There is nothing odd about that whatsoever. But that does not deal as to lasers based in space or outside the——

Mr. **Perle**. It is categoric in addressing the subject of lasers. There are no qualifications as to where the lasers are based, Senator.

Chairman **Biden**. Thank you, Senator.

Let me move on to a second round here, if we can.

Mr. Perle, you made an analogy to the SS-19. You compared the episode of the SS-19 issue and SALT I to this process that is going on right now. In that case, you said the executive branch represented to the Senate an interpretation of a provision that was significantly different from the interpretation understood by the Soviet Union.

Is that correct?

Mr. **Perle**. That is correct. We had an interpretation that the Soviets did not share.

Chairman **Biden**. Is there not a fundamental difference, though, that in that case, did not the Soviet Union publicly and immediately disavow the interpretation that the administration had presented?

Mr. **Perle**. I don't believe that they commented on it prior to the approval by the Senate of the resolution approving the interim agreement. I am unaware of any such statement.

Chairman **Biden**. That's correct.

Mr. **Perle**. But they were under no obligation to do so.

Chairman **Biden**. I understand that. But, afterward, in that case, did not the Soviet Union, when we went forward with our interpretation, did they not promptly disavow that interpretation?

Mr. **Perle**. They said you can take your unilateral statement and go home with it. We are not bound by your unilateral statement.

Chairman **Biden**. I understand that. But they did say that, correct?

Mr. **Perle**. They did.

I think you will also find various Soviet spokesmen expressing the view that research, development, and testing of systems based on other physical principles is permitted——

Chairman **Biden**. Have they ever done that?

Mr. **Perle** [continuing]. Subsequent to ratification of the treaty.

Chairman **Biden**. Have they disavowed the narrow interpretation, the Soviets?

Mr. **Perle**. Well, they have found it convenient, since the United States began the strategic defense initiative in 1983, to adopt the view that the narrow interpretation was correct.

Chairman **Biden**. Have they ever adopted any other view, do you have any evidence?

Mr. **Perle**. Yes. I believe the view they adopted throughout the whole of the negotiation was to the contrary.

Chairman **Biden**. Is there any evidence of that?

Mr. **Perle**. Yes. The negotiating record. You ought to read the negotiating record.

Chairman **Biden**. I mean is there any evidence in their conduct, subsequent to the ratification of the treaty?

Mr. **Perle**. Well, we don't know, because it is almost hopelessly unverifiable, Senator.

Chairman **Biden**. I see.

Mr. **Perle**. I don't know how we would verify, for example, a ground mobile laser, or a ground mobile particle beam device. I don't know how we would begin to verify such a thing.

Chairman **Biden**. In the ratification record, it seems to be pretty clear that Senator Jackson understood the narrow interpretation. It seems to me it was clear because Senator Jackson went to great lengths to establish that, despite the treaty's prohibitions, it would still be possible for the United States to develop a fixed, land-based ABM, that is a fixed, land-based laser.

So he obviously understood the narrow interpretation very clearly, as did numerous other Senators, including Senator Buckley, who voted against the treaty precisely for that reason.

Now, you say that the narrow interpretation was unverifiable, and you explain that Senator Jackson voted for this narrow interpretation because he got caught up in the temper of the times.

Mr. **Perle**. No, I didn't say that.

Chairman **Biden**. Well, what did you say, then?

Mr. **Perle**. I said he was well aware of the fact that the ABM Treaty would be overwhelmingly ratified. He believed that the most useful role he could play——

Chairman **Biden**. Would be to vote for it?

Mr. **Perle** [continuing]. In urging the Senate to reflect on what he thought was not an entirely successful negotiation was in drawing the attention of the Senate to the inequities in the interim agreement. And so, his energies were devoted principally to that. And he succeeded.

Chairman **Biden**. But he understood narrow versus broad in the ABM Treaty, voted for narrow, and, nonetheless——

Judge **Sofaer**. He voted for the treaty.

Chairman **Biden**. But he voted for the treaty after defining that he understood it to apply to all ABM systems in what we now call the "narrow" interpretation. Did he not?

Judge **Sofaer**. I think that is a fair statement. I would think that is a fair statement.

Mr. **Perle**. I think it is also correct to say—and you were not here, Senator—that the question of what activities were permitted, with respect to systems based on other physical principles, based in space or at sea or so forth, was not a salient issue either for Senator——

Chairman BIDEN. It was an issue, though.

Mr. PERLE [continuing]. Either for Senator Jackson or anyone else except——

Chairman BIDEN. But it was raised repeatedly.

Mr. PERLE [continuing]. Except Senator Buckley.

I am just trying to convey to you what happened.

Chairman BIDEN. It was raised by Senator Jackson.

Mr. PERLE. I am giving you an eyewitness account.

Chairman BIDEN. I understand that.

Mr. PERLE. The attention of the Senate was not devoted to this issue, Senator Biden.

Chairman BIDEN. No, not exclusively, but it was one of the clear issues. He raised it, Senator Jackson. Just go back to your discussion, your reference to General Palmer.

Mr. PERLE. Senator Jackson, almost alone, with a handful of other Senators, thought it was important to establish as clearly as they could what the treaty permitted and what it did not permit.

Chairman BIDEN. Correct. And he clearly established that, in fact, the narrow interpretation was what the Senate was voting on. Senator Jackson was well-respected, and he acknowledged the narrow interpretation after having questioned the administration on broad versus narrow. If he concluded that it was narrow, is it not reasonable to assume that the Senate thought it was thoroughly investigated when the man who you worked for and whom we both revere turned out to be the guy saying "narrow" is what it is?

Mr. PERLE. I think, to put it in perspective——

Chairman BIDEN. That's what I am trying to do.

Mr. PERLE [continuing]. The interest of the Senate in this particular issue was minimal. The labors of the Senate with respect to this issue was minimal.

Chairman BIDEN. Senator Jackson kept pushing.

Mr. PERLE. I am just offering you a view of what I think the reality of that discussion was. It isn't going to change your view of the issue or I think anyone else's.

Chairman BIDEN. But it sure impacts on the Constitution.

Mr. PERLE. Let me say that if the view that had been presented in 1972 had been that, with respect to systems based on other physical principles, testing in space was permitted, the ratification vote in the Senate would probably have gone from 88 to 2 to 89 to 1——

Chairman BIDEN. No question.

Mr. PERLE [continuing]. Because I suspect that Senator Buckley would have supported the treaty under that circumstance.

Chairman BIDEN. You know, that is the most incredible non sequitur. It is like saying that tomorrow, if we negotiated an agreement with the Soviets in which the Soviets unilaterally agreed they would tie one hand behind their backs and allow us to move forward where they could not, that we would somehow reject it because someone would stand up and say this is unfair to the Soviets. Of course we would be for it. Of course you would be for any treaty that allowed us to do more than the Soviets could.

Mr. PERLE. Oh, no.

Judge SOFAER. No.

Chairman BIDEN. We are not in the business of protecting the Soviet Union.

Mr. **Perle**. No, no. I was talking about on a mutual basis. I think the Senate was largely indifferent to the treatment of the systems that did not exist.

Chairman **Biden**. Senator Jackson was not indifferent to it.

Mr. **Perle**. Yes, I think he was.

Chairman **Biden**. He was very precisely specific.

Judge **Sofaer**. He was very determined on finding out what we could do.

Chairman **Biden**. That's right.

Judge **Sofaer**. But what Secretary Perle is trying to say is that if you had told him that we could do more and that the negotiators had understated our flexibility vis-a-vis the Soviet Union because they had not bound themselves, Jackson and the Senate would have been happier, not unhappy.

Chairman **Biden**. Sure, they would have been happy. But that was not the case.

Judge **Sofaer**. But that is a relevant legal consideration because———

Chairman **Biden**. Oh, Judge, that is preposterous.

Judge **Sofaer** [continuing]. Because the issue in legislative intent———

Chairman **Biden**. That is absolutely preposterous. On the record, in numerous places, Senator Jackson presses the administration witnesses as to whether it is broad or narrow. In pressing Palmer again, Palmer says that it does not prohibit the development of the fixed, land-based ABM system: "We can look at futuristic as long as they are fixed and land-based. Jackson: I understand. Palmer: The Chiefs were aware of that and had agreed to that, and that was the fundamental part of the final agreement."

Now, Jackson obviously looked at it. We go back, and Mr. Buckley stands up on the floor and he says, and I am paraphrasing, the reason I am not for this treaty is because we are restricted in this treaty on futuristic systems. And he says that is why I am not voting for it, and you should not vote for it either.

And Jackson says in other places that we are restricted. Nonetheless, I am voting for it.

Now, I don't care what Senator Jackson's larger motives were. They could very well have been exactly what you say. He figured that if he, in fact, voted against this, it would limit his ability to impact on SALT I. It could have been that it would have impacted on his chances to be President. It could have been it would have impacted on you and you would have gone and quit. It could have been anything else. But it is irrelevant. It is irrelevant.

What is relevant is what he said, not his ulterior motive for having said it. What is relevant is what is on the record. What is relevant is that the U.S. Senate did, in fact, address the question and a leading defense expert in U.S. Senate said I understand it is restrictive and I am voting for it based on that restrictive interpretation.

Mr. **Perle**. No, he did not say that, Senator. He understood it to be restrictive, but he never said he was voting for the treaty because of the restrictive interpretation.

Chairman **Biden**. Agreed. He said I am voting for it in spite of the restriction, possibly. But he said I am voting for the treaty, knowing full well the United States is restricting itself. That is what he said by his vote.

There is no other reasonable interpretation.

Mr. PERLE. I think one of the extraordinary things about the Senate ratification debate—and this was not the Senate's finest hour, in my view——

Chairman BIDEN. Of course, because you disagree with it.

Mr. PERLE [continuing]. Is that there was virtually no serious debate on the floor of the U.S. Senate about what the ABM Treaty meant.

Chairman BIDEN. Part of the reason, I would suspect——

Mr. PERLE. There were questions in hearings, poorly attended hearings, but there was virtually no debate on the floor of the U.S. Senate.

Chairman BIDEN. One of the reasons why, I would suggest, having been here almost 15 years and coming a year after this was ratified, is because when Senator Jackson stood up and said he was satisfied. The way this body works is that we all look to others who are experts on different areas. I look to this Senator from Pennsylvania [indicating] because he is an expert on civil liberties and civil rights. I look to Senator Nunn because he is an expert on a number of things relating to the Armed Services Committee and things relating to our defense. That is the way this body works. You do not have 100 Senators who are expert on every single thing. And when Senator Jackson stood up and said I'm voting for this treaty, and, in fact, said throughout the record I understand we are restricted, as a consequence of this vote, that is one of the reasons why the Senate, I suspect—and I think I know the body almost as well as you do, Mr. Secretary, having been here almost as long as you have—it seems to me that this is why the Senate would not have debated it more.

We do not debate things where there is not great disagreement. Obviously, there was uniform agreement in the Senate that this was restrictive language.

My time is up. I yield to my expert from Pennsylvania, for whom I have great respect.

Senator SPECTER. Thank you, Mr. Chairman.

The record which we have here today may be scrutinized sometime, and it is going to be hard, and I say this having sat through the entire session, as to what the answers were to the questions. I have heard a lot of questions, but I have not heard too many answers.

Chairman BIDEN. I think that is an unfair statement, Senator.

Senator SPECTER. Well, I will stand by it.

The question that I have for you, Secretary Perle, is do you agree with what Senator Biden has asserted, that Senator Jackson agreed with an interpretation that we are now defining to be the narrow interpretation?

I have read Senator Jackson's testimony repeatedly, and Senator Biden has asserted that it is, in fact, the narrow interpretation. I would like to know if you agree with that?

Mr. PERLE. Yes. I think all that Senator Jackson had to go on was what was said to him by various officials of the executive branch and the view they presented was the narrow interpretation. I never denied that.

What is at issue is the salience of that in the totality of the Senate's deliberations. This was a footnote, at best.

Senator SPECTER. You have used the word "salient" a number of times, Secretary Perle. Was it salient in your judgment in Senator Jackson's mind?

Mr. PERLE. No; the reason why it was not salient is that we had no program, no prospects for a program in the foreseeable future, to do those things.

He was most concerned that we not terminate ongoing research, which is how he got into this issue. The issue was really triggered by news accounts that a contract for a ground-based laser had been cancelled in the aftermath of the conclusion of the treaty. Senator Jackson and some others pressed various Defense Department officials, in particular, and others, as to whether that story was true.

That helped to frame the whole discussion of permitted and prohibited activity in this area. But there was no program. This was, as indeed it was understood to be, something in the distant future, and nobody paid a great deal of attention to it.

Senator SPECTER. Secretary Perle, when you say that the only evidence presented to the Senate was the narrow interpretation, what about some of the testimony of Ambassador Smith, which said that there was a prohibition against future deployment?

Now that is consistent with no testing. But it is also consistent with testing and development.

What was the issue really focused on to that extent?

Mr. PERLE. I think—and I can only speculate here—that if you look at all of the statements that were made, they are all clear on the issue of deployment. They seldom actually, except in direct response to questions, reflect on the question of development and testing.

I think the reason is that there was, there must have been, in the minds of all the negotiators, some uncertainty as to whether the Soviets had agreed to that. And, indeed, there is documentation available, contemporaneous documentation, that indicates that various officials of the executive branch either held a different view, that is, the broad interpretation, or acknowledged that it was unclear as to whether the Soviet Union agreed with the interpretation that was put on Agreed Statement D by the United States.

A fair reading of the record will reveal that.

Senator SPECTER. Well, were those interpretations brought to the attention of the Senators who were part of the ratifying process?

Mr. PERLE. No, they were not. We did not plumb this issue in the depth that it now is clear it deserved. It is why I took pains in my opening statement to indicate that we tried, as best we could, to understand what was in the treaty, and we did not do as well as we might have. If we had examined the negotiating record, I am quite confident we would have concluded then what we have concluded now.

Senator SPECTER. Well, have you answered Senator Kerry to the effect that there was testimony in the negotiating record which supported the broad interpretation or supported testing and development?

Mr. PERLE. Oh, yes. There is no question about that. No question about it.

There are documents passed between very senior officials—the chairman of the Joint Chiefs of Staff in correspondence with the Secretary of Defense a matter of days after which the treaty was concluded, in which it is said categorically that the testing of systems based on other physical principles is permitted. There were no qualifications as to whether they are space-based or ground-based.

There was a great deal of confusion.

Senator SPECTER. Can you be specific on that? I don't think you were that specific in response to Senator Kerry's question.

Mr. PERLE. Yes. It is a statement concerning verification that is dated June 2, 1972. The exact words of the statement are classified. But the gist of it, and I cannot see any reason why they should remain classified, but the gist of it without qualification, was that the testing of systems based on other physical principles—and some were specifically identified as lasers and directed energy devices and the like—is permitted.

Senator SPECTER. Judge Sofaer, in your statement, you referred to Senator Jackson, at one point mentioning that the State Department had promised an analysis of the treaty and that such an analysis was, in fact, prepared, but a legal analysis was not formally requested or provided.

Do I infer from that, or are you implying here that there is something in writing that was deliberately not provided to Senator Jackson?

Judge SOFAER. I don't know what happened, but it is a matter of public record. Mr. Rhinelander has testified to it openly and has written about it, that he prepared a section-by-section legal analysis which spelled out, ultimately, the narrow interpretation in much clearer terms than it was spelled out at any time in the ratification process.

Senator Jackson does say in the record, "We still do not have what the State Department said would be made available later, a so-called interpretation of the agreement. '

Now, this could have been referring to the interpretation that had been prepared over there, and it was never submitted to the Senate.

Senator SPECTER. Well, what happened to it?

Judge SOFAER. I don't know. I mean, it is in the records. That memorandum has been supplied to the Senate. I gave you the latest version of that memorandum that I could find.

Senator SPECTER. So a memorandum was prepared by Mr. Rhinelander, and the document which was ultimately presented to the Senate was significantly different?

Judge SOFAER. Well, it goes beyond that. There were papers prepared, and I think Mr. Rhinelander has said that he wrote a transmittal package for the Senate, which was cut way down. You can go into it with him more.

But the fact is that the issue of the narrow-versus-broad interpretation would have been much more clearly and definitively resolved, and for some reason those clear and definitive papers were not sent to the Senate.

Senator SPECTER. Well, when you say that we can go into it with Mr. Rhinelander, we really cannot, because he has not seen the papers. He reaffirms that in his statement again today. And we are not at liberty to discuss them in this open hearing.

Mr. Chairman, if I could have your attention for a moment, what Judge Sofaer is pointing out again points to the difficulties we have in having a secret record, which witnesses such as Ambassador Rhinelander cannot look at, and I would again raise with you, as I did in the earlier hearing, the necessity to perhaps have some closed hearings if these records are not to be disclosed.

We really cannot ask Ambassador Rhinelander these questions in a fair way. We cannot ask him—

Judge SOFAER. I think he has written about some of it. But you are right. There is no reason why we should not have a closed hearing. We would welcome that.

Chairman BIDEN. I have no objection to a closed hearing, notwithstanding that I do not think it is relevant. But you can have it.

Senator SPECTER. Well, I am not really sure, after sitting through 3½ hours of hearings, how much we have talked about has been relevant.

Chairman BIDEN. Are you serious, Senator?

Senator SPECTER. Yes, I am serious. I'm serious. I sure am.

Judge SOFAER. Senator, could I tell one short story about what you were saying earlier? It might pertain to Senator Biden's problem as well.

I found one interesting thing in my review of the subsequent practice—the substance of this piece of paper is classified but I can certainly tell you about what happened.

An issue arose in the Standing Consultative Commission where our representative said to the Soviet representative, don't you remember that Ambassador Smith said during the Senate ratification process when you had a representative sitting there—and Senator Nunn has pointed that out that there was a representative of the Soviet Union sitting there at some of these hearings—don't you remember that Ambassador Smith said X about subject Y, and you didn't say anything? You have never objected to what Ambassador Smith said about that. And the Soviet negotiator responded that what Ambassador Smith said in your Senate hearing is a matter of your internal concern. It is no business of ours to respond to anything he said.

This is the problem we confront.

Senator Biden has this justifiable concern about the domestic impact of international treatymaking, and I think we have to work the problem through in a way where we don't get a solution to the problem of informing the Senate adequately which, in effect, ties us to a nonmutually binding meaning of a treaty.

Senator SPECTER. Judge Sofaer, Senator Biden and I may——

Chairman BIDEN. The Senator's time is up. Do you have anything else you want to say?

Senator SPECTER. Well, I do. I was about to say something flattering to you.

Chairman BIDEN. Oh, there is no need for that. [Laughter.]

Senator SPECTER. Well, what I was about to say and I will finish it, is that we may have a disagreement as to whether all of this has been relevant, but the most relevant comment made was Senator Biden's comment about the Constitution. I think that is a very important factor underlying what we are dealing with here.

I would just like to ask one more question or followup on this if I may, Mr. Chairman.

Chairman **Biden**. Go ahead.

Senator **Specter**. It is this. The long and short of what you are saying as to the document prepared by Ambassador Rhinelander is that it would have presented a much narrower interpretation of the ABM Treaty had it been submitted to the Senate in the form that he presented. We would have to compare that document with what he actually presented and then draw our own inferences as to what had happened.

Is that the long and short of it?

Judge **Sofaer**. That is part of the process that you will go through when I submit my report.

Senator **Specter**. Thank you very much.

Chairman **Biden**. I'm not sure that I understand the answer.

Are you saying that the Rhinelander memo was a more narrow interpretation—is that what you are saying—than, in fact, the Senate was led to believe?

Judge **Sofaer**. No. The Rhinelander memo was a clear exposition of the narrow interpretation.

Chairman **Biden**. Right. It was not a more narrow interpretation, as the Senator asked you?

Judge **Sofaer**. More narrow than the vagueness that came over in the transmittal documents.

Chairman **Biden**. It was a clear exposition that the narrow interpretation was the relevant interpretation, correct?

Judge **Sofaer**. That's right, sir.

Chairman **Biden**. That's right. OK.

I yield to my friend from New Hampshire.

Senator **Humphrey**. Thank you, Mr. Chairman. I am grateful to have another opportunity.

I must say that I participate only reluctantly in this game because it is the only game in town. And until the President comes out from the shadows and stops equivocating, and until the President goes to the American people and tells them boldly and forcefully what is going on, that the Soviets are cheating, that our Nation's security is being imperiled, how this promising means of defending the Nation is being retarded, this is the only game in town.

I do not think we are clarifying things much here and I don't think we ever will, frankly.

But what is clear to me is that this is a losing game for the President and a losing game for SDI. I hope the Gipper appears on the field soon before this thing is lost by default.

Now, as to the narrow—here we go again, back into the game—as to the narrow/broad interpretations, as they are called in 1987, I am sure there has already been reference, if not in the date, in discussion here, in the committee today, at least in the debate this year, reference to the Nitze letter of 1977, 10 years before this broad/narrow thing ever was conceived—or 8 years, I should say, 8 years before this controversy ever arose. Ambassador Nitze wrote to the Journal of International Security, demolishing, in my opinion, the Garthoff-Rhinelander claim that the American negotiators had succeeded in securing a ban on future systems.

Our colleague from Indiana, Senator Dan Quayle, has done the Senate and the American people a great service today by releasing yet another letter of that genre. Where is that letter? I have so much paper here that I can't find my way through it.

It is from the Deputy Negotiator in the Defense and Space Group, Henry F. Cooper, dated August 29, of last year, written to Senator Quayle, subsequent to a conversation.

I would ask, Mr. Chairman, that this entire letter, which is four pages—three pages—be included in the record.

Chairman BIDEN. Without objection.

[The information referred to appears in the appendix.]

Senator HUMPHREY. I want to cite a couple of pertinent sections.

The second paragraph, in Mr. Cooper's words, indicates that the March 1985 Soviet proposal—let me back up.

It seems that Mr. Cooper and Senator Quayle had had an earlier conversation about a Soviet proposal, tabled, I guess, in Geneva, in March 1985, and that is what this paragraph refers to. "The March 1985 Soviet proposal, which is still on the table, included a ban on the development, testing, and deployment of so-called space-strike arms. The Soviets have defined 'space-strike arms' to include all space-based ABM systems and components, all space-based weapons capable of attacking targets in the atmosphere and on the Earth's surface, and ASAT systems of all basing modes."

The third paragraph: "Their proposed ban on the latter two categories, that is, space-to-Earth weapons and ASATS clearly went beyond existing international commitments, but their proposed ban of space-based ABM systems at first puzzled us"—the State Department I guess is us, is we—"at first puzzled us because it seemed redundant with the existing United States-Soviet obligations under Article V of the ABM Treaty."

Skipping over a few sentences to the fourth paragraph, "Light was shed on this puzzle last year by an intensive internal review of the ABM Treaty negotiating record."

And then, skipping over some more, to about the sixth paragraph, I guess—one, two, three, four, five, six—"in this light, we now understand that the inclusion of all space-based ABM systems and components in the March 1985, Soviet proposal to ban space-strike arms was not redundant with prohibitions under the ABM Treaty, as we first thought. Furthermore, I believe the Soviets probably had believed since 1972, that the ABM Treaty permitted development and testing of other than fixed land-based ABM systems, composed of ABM interceptors, launchers, and radars."

Well, there is yet another letter of that type that would seem to indicate that the Soviets, for their part, thought that there were no restrictions on SDI-type technology. The Soviets, for their part, until 1985, at least, embraced what is now known as the broad interpretation.

This lends further credence to the argument that our negotiators pretty substantially failed to get what they sought and were instructed to get and to secure; namely a ban on SDI-type research and testing and development of SDI-type technologies.

I think the letter from Mr. Cooper, supplied by Senator Quayle, adds an interesting new light to this debate. But I don't think that is going to be conclusive either because I don't think anything is going to be conclusive, and we are going to end up chasing our tails round and round and round, while the Soviets race in a straight line for a breakout from the ABM Treaty in the early 1990's. And, indeed, they have already broken out in a significant way through the building of these Krasnoyarsk-type radars, three more of which we have discovered in recent months.

I want to return if I have some time——

Chairman **Biden**. You do.

Senator **Humphrey** [continuing]. To the practical effect of the Biden resolution, were it to be passed, and were the administration to be guided by it.

Mr. Secretary, Senator Biden, in his remarks introducing the resolution, refers to an ABM system, quoting the Senator, an ABM system "which the administration reportedly wishes to test in order to break through the traditional treaty interpretation is a so-called kinetic-kill weapon that relies on a rocket for propulsion and a kill mechanism no more futuristic than the rock David hurled at Goliath."

Well, those of us who know something about that test know that Goliath had only a pair of human eyes, but the means of acquiring weapons in space are a good deal more sophisticated than human eyes, and, indeed, the kill mechanism is a good deal more sophisticated than a plain rock.

But thank goodness—and I am sure the Senator will join me in this—we found a way of destroying hostile objects in space without resort to use of nuclear weapons. Thank goodness it is basically just a rock. I think we should all be glad of that.

Now, what about this test? What can you tell us? What is the significance of narrow versus broad with respect to this test?

Mr. **Perle**. If this is a question that deals fundamentally with the technologies involved, I would be hesitant to claim expertise. But I believe it is possible, in attempting to validate technologies of the type under consideration, to degrade the performance of the system so that it is within the narrow interpretation of the ABM Treaty.

So, the broad interpretation is not essential to the conduct of the test, although the test conducted pursuant to the broad interpretation would be a more effective test, it would be a cheaper test, it would produce more reliable data, and it would enable the country, the Executive and the Congress ultimately to make intelligent decisions about whether it is in our interest to proceed beyond the testing phase.

I think we will be deprived of an opportunity to make that judgment unless we are able to conduct realistic tests.

Senator **Humphrey**. We will not have the opportunity to decide whether we should proceed—can you define this a little bit more? It sounds as though this is a pivotal test. How did you just phrase it a moment ago?

Mr. **Perle**. A test like the one that you have in mind can be conducted, even under the narrow interpretation of the treaty. But we would have to degrade the performance of the components involved so that they would be incapable of intercepting a ballistic missile in flight trajectory in order to meet the test of the narrow interpretation.

Senator HUMPHREY. Yes. In other words, it would be a theoretical test versus a practical test?

Mr. PERLE. Well, it would be a much less productive test.

Senator HUMPHREY. The test could not involve destroying an object in space through kinetic contact?

Mr. PERLE. It could not involve destroying a ballistic missile in flight or its elements in flight trajectory. It could destroy some other sort of object in space.

Senator HUMPHREY. So, it would not be a real world test?

Mr. PERLE. It would be a much less realistic test than would be permitted under the broad interpretation.

Senator HUMPHREY. Can you tell us to what extent that would retard the SDI Program?

Mr. PERLE. Oh, I think it will clearly retard the SDI Program.

Senator HUMPHREY. To what extent?

Mr. PERLE. Significantly.

Senator HUMPHREY. Significantly.

Mr. PERLE. And I believe it will also——

Senator HUMPHREY. Can you quantify that in years or months?

Mr. PERLE. That is difficult to do. I would refer that to General Abrahamson.

But it would also, I think, do grave damage to our efforts to negotiate in Geneva, since the issue that principally concerns the Soviets, is precisely this question of what restrictions will apply in the future on the development and testing and perhaps eventual deployment of strategic defenses. So, if a decision is made here, and unilaterally, to restrain the United States, I think we will find it far more difficult—I went so far as to say I suspect that we would fail in Geneva, when I think we are almost certainly now in a position to consolidate the gains of the last several years and conclude some very important treaties.

This seems to me at least as serious a concern as the impact on the test program.

Senator HUMPHREY. Thank you.

Thank you, Mr. Chairman.

Chairman BIDEN. Thank you very much.

There are so many more questions to ask. We are not able to meet beyond 2 o'clock.

Obviously, Judge Sofaer will have an opportunity to come back. I hope that you would be willing to come back at another time, Mr. Secretary.

Mr. PERLE. I would be delighted.

Chairman BIDEN. I have one question for you, Mr. Secretary, prior to your leaving.

I refer to information you imparted to us about the taped conversation between Mr. Brezhnev and one of his generals.

Mr. PERLE. Grechko.

Chairman BIDEN. This private conversation, has that been declassified?

Mr. PERLE. Unfortunately, it was reported in the newspapers with the result that the Soviets ceased immediately communicating over a system that we had otherwise been able to penetrate, with tremendous loss to our national security.

Chairman **Biden**. Why did you confirm it today, then?

Mr. **Perle**. Well, it is more than 15 years old, and it was extensively published. I do not think I have done any harm in that regard.

Chairman **Biden**. OK.

Thank you very much.

Mr. **Perle**. Could I ask, Senator, this. I had a longer opening statement which in the interest of the committee's time I refrained from giving.

Chairman **Biden**. The entire statement will be placed in the record, as if read.

I thank you both for coming. I look forward to your coming back.

Let me explain what we are going to do the next 12 to 15 minutes.

Ambassador Smith, I would like very much to welcome you to testify and to ask our other distinguished witnesses, who I understand have graciously agreed to return another day—John Rhinelander, who knows the issue firsthand, as the legal counsel to the ABM negotiation team, and Prof. Abram Chayes, a distinguished constitutional lawyer, who was President Kennedy's legal adviser at the State Department.

We are only going to hear from Ambassador Smith today, and I am not going to have a chance to ask questions. But Ambassador Smith indicated, since his name was used so many times today, that he would like to make a statement, at least at this point.

I understand that you have some fairly strong disagreements with some of the testimony given today.

Again, I apologize to the other witnesses. I wish we could clear the room fairly quickly because our ability to legally continue to meet beyond 2 o'clock is nonexistent at this moment.

So, if we could hear just from Ambassador Smith, we would appreciate it.

Professor, you are welcome to sit down, but I don't think we are not going to get a chance to hear from you, unfortunately, today.

STATEMENT OF HON. GERARD C. SMITH, HEAD, ABM TREATY NEGOTIATING DELEGATION (1972), WASHINGTON, DC

Ambassador **Smith**. Mr. Chairman, in the interest of saving time, I would just like to submit my statement for the record and make a very few observations.

Chairman **Biden**. Your entire statement will be submitted for the record, and I would like to ask you, if you would, after you make your observations, whether or not you would be willing to come back at a convenient time for you.

I sincerely apologize. Earlier, when this meeting was scheduled, we thought we would be able to go the entire day. Some of our colleagues have insisted on the rule, which they have a right to do, and I hope you understand why we felt we had to question Mr. Perle and Judge Sofaer as long as we have.

But, go ahead, Mr. Ambassador.

Ambassador **Smith**. I thought I heard one of the previous witnesses state that President Nixon had finally agreed to the broad interpretation. I have no recollection of that ever having happened.

On the question of whether the delegation carried out its orders, there has been some question raised this morning if that is a fact.

I asked Henry Kissinger within the last 4 days what were the facts, and he said, "I assure you that the delegation carried out its orders." And he said, "and I don't mind your stating that in testimony."

There have been a few statements that I think are incorrect that I would like to touch on.

It was said, for instance, that the Soviets have cheated in regard to not disclosing that they had a third test site.

The provision of the treaty said the testing would be done in certain test sites and such others as to be agreed upon mutually. And we agreed upon this third test site with the Soviets. There is no question that this was inconsistent with the treaty.

On the whole subject of the heavy and light missiles, we knew perfectly well that no agreement had been reached. We submitted a unilateral statement. I advised the President that it certainly was not something he should rely heavily on, and, as soon as we made that statement, we acknowledged that it was unilateral and the Soviets said you cannot bind us by that sort of thing.

So we were not surprised. We did have intelligence that the Soviets were building a larger ICBM. In fact, as I recall it, one of the Soviets told Mr. Nitze that the new ICBM would not be more than one-half again as large as the SS–11. So, they disclosed this to us. It did not come as a surprise. I don't think it should be considered as an example of Soviet cheating.

One other thing. Senator Humphrey, I believe, referred to a letter from Paul Nitze in 1977. I have seen that letter and it flatly concludes that the narrow interpretation is correct. I think the conclusion that the Senator drew from it was 180 degrees away from what Nitze said.

I think I will stop and try to answer any of your questions.

[The prepared statement of Ambassador Smith may be found in the appendix:]

Chairman **Biden**. Well, I have many and there is so much light you can shed on this.

Professor, since you are here, we have 8 minutes left, fire away until they bring down the curtain.

STATEMENT OF HON. ABRAM CHAYES, FORMER LEGAL ADVISER, DEPARTMENT OF STATE, FELIX FRANKFURTER PROFESSOR OF LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MA

Mr. **Chayes**. I said I would come back at another time, and Mr. Ritch asked me to examine some of the assertions about international law and constitutional law that have been made by the witnesses today. And so, I really would prefer to do that.

But I would say that if you accept Judge Sofaer's view of what the Senate has to do to make something stick in ratifying a treaty, what he says is first you have to go get the secret negotiating record, and if you don't do that, it is your fault.

Second, you have to insist that you are totally informed on every point by the Executive.

And, third, you have to translate that into an understanding. Otherwise, the Executive, in the future, is free to disregard whatever went on in the Senate hearings.

I think that is a prescription for simple chaos in the conduct of the partnership, as you rightly call it, the 200-year-old partnership between the Senate and the President in treatymaking. If that is the way the Senate has to conduct itself in order to have an impact on the meaning of a treaty, I just do not see how the ratification process can work.

[The prepared statement of Mr. Chayes may be found in the appendix.]

Chairman BIDEN. I don't understand it, either, quite frankly, Professor. I am truly perplexed by the explanations that Judge Sofaer gives as to the constitutional requirements of the executive branch to inform the Senate.

It seems to me that we, the Senate, in order to do our job, must essentially rewrite the treaty. We must renegotiate the treaty, every single, solitary line of the treaty.

Senator Helms and Senator Humphrey either state directly or imply that this is just "President-bashing," But Lord forbid what the next President of the United States will have to go through in order to get any treaty ratified in this body if, in fact, we accept that the broad interpretation is an interpretation that can, in fact, be upheld under the existing treaty.

It seems to me that we are putting at risk our ability, the President's ability, to conduct international relations.

Mr. CHAYES. I would like to make just one other comment because it goes to the question of whether these hearings are premature or not.

It is true that since the Senate has asserted its prerogatives and since the allies have raised a fuss—and that happened way back in October 1985—the President has backed off from the question of whether he is really going to test in violation of the narrow interpretation. He says that, for the time being, he will abide by the narrow interpretation as a matter of policy.

But there is no doubt that he has officially accepted the broad interpretation as the "legally correct interpretation" of the treaty, and, in fact, that has an acronym, like everything else has. They call it the LCI. They don't talk about the broad interpretation or the narrow interpretation. They talk about the LCI, which stands for the "legally correct interpretation" of the treaty.

This is where we are now. There is no thought, and there has never been any suggestion so far as I know publicly, by either the President or the Secretary of State, that they will abandon that as the legally correct interpretation.

They have said they might not use all the leeway that it gives them. But they have not said they will retract that notion.

That is the interpretation that Mr. Sofaer committed the United States to when he spoke on the basis of a partial examination of the record in October 1985.

Chairman BIDEN. I thank you, Professor.

I would just add, before I yield to Senator Pell, that my experience with not only this administration but with four Presidents is that had we not undertaken this process when we did, in the hearings, as we have, there might not have been as much of an indication or a willingness to depart from previous statements made, whether it was in the Harvard Law Review, or in any other written document.

I may be mistaken, but I suspect that the reexamination by the Members of the Senate and the Senate committees has propelled the administration to think better of what they have said thus far.

My sincere hope is that after this process finishes, they will reconsider the entire process, and the President will have the good grace to avoid a constitutional conflict and either abrogate the treaty, based on what he is allowed to do within the treaty—and I hope he does not do that—or adhere to the treaty, but not attempt to amend the treaty unilaterally.

I yield to my colleague and thank you both very much. I hope you will be able to come back.

Chairman PELL. Thank you very much, Senator Biden. I look forward to reading the testimony of the negotiators.

I would like particularly to express my own deep respect, esteem, and regard for Ambassador Smith, whose words mean a great deal to me.

I regret to say that another meeting is scheduled in the same room on a completely different subject, narcotics in the Caribbean area, and, accordingly, it is my sad duty to bring this hearing of the Judiciary Committee and the Foreign Relations Committee to a close.

[Whereupon, at 1:59 p.m., the hearing was concluded.]

THE ABM TREATY AND THE CONSTITUTION

WEDNESDAY, APRIL 29, 1987

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
AND
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committees met at 10 a.m., in room SD–419, Dirksen Senate Office Building, Hon. Claiborne Pell (chairman of the Committee on Foreign Relations) and Hon. Joseph R. Biden, Jr. (chairman of the Committee on the Judiciary) presiding.

Present from the Committee on Foreign Relations: Senators Pell, Dodd, Adams, Helms, Lugar, Pressler, and McConnell.

Present from the Committee on the Judiciary: Senators Biden, Specter, and Humphrey.

Chairman PELL. Committee on Foreign Relations will come to order.

Today, in resuming joint hearings on the administration's so-called reinterpretation of the ABM Treaty, the Foreign Relations and the Judiciary Committees will hear from two panels. On the first are legal scholars who will address the theory of the Senate's role in treatymaking propounded by Judge Sofaer at our second joint hearing on the ABM issue. On this panel, the committee has scheduled two former legal advisors, Abram Chayes and Leonard Meeker, and a former assistant legal advisor for treaty affairs, Arthur Rovine. However, because Professor Chayes had pressing obligations elsewhere, he will be ably represented by his wife, Antonia Chayes.

Mrs. Chayes is a former Under Secretary of the Air Force, and was coauthor with her husband of an excellent Harvard Law Review article last year analyzing the reinterpretation issue.

On our second panel we will hear from Mr. Sidney Graybeal, who was one of the key ABM Treaty negotiators, and who is responsible for the now well-known Fitzgerald-Graybeal study conducted for the Pentagon in early 1985. Also on the panel is Mr. William Sims, a former attorney-advisor in the State Department legal advisor's office. Mr. Sims will testify today on the condition that he not divulge actual discussions in which he participated while serving in the executive branch, and our committees will, I trust, honor that condition.

In addition, two key administration witnesses were scheduled to appear today, Mr. Thomas Graham, General Counsel at ACD, and Mr. Jack McNeill, Assistant General Counsel in the Defense Department. However, at the last moment the administration apparently made a coordinated high level decision to block the testimony of both witnesses.

The administration's reinterpretation of the ABM Treaty represents, in my judgment, a misuse of Executive power involving a studied disingenuous attempt to rewrite history as well as our Constitution. With today's action, we know now that in pursuit of revising the treaty the administration is also prepared to severely constrain the democratic process.

Not only did our administration try unsuccessfully to withhold key information from the Senate last summer. Now it has muzzled key witnesses scheduled to testify before these committees. We will have to consult together to decide on an appropriate response. Senator Biden.

Chairman **Biden**. Thank you very much, Mr. Chairman.

Today marks the third in a series of joint hearings conducted by the Foreign Relations and Judiciary Committees on the administration's so-called "reinterpretation" of the ABM Treaty, which emerged suddenly and surprisingly in October 1985. Although the administration has not yet acted to violate the ABM Treaty, its continuing assertion that it has a legal right to do so on the basis of this "reinterpretation" poses not merely a technical dispute for lawyers but an issue of historic proportions with regard both to the American Constitution and American strategic policy.

Will we, in our Constitution's bicentennial year, knowingly ignore its clearly delineated imperatives regarding the making and implementation of treaties? Will we, in pursuit of a naive Presidential fantasy known as Star Wars, abandon a bipartisan strategic policy which has been the bedrock of American national security throughout the critical years of the nuclear age?

Our initial joint hearings underscored three propositions clearly and emphatically:

First, testimony from the treaty's negotiators underscored that there was no ambiguity emanating either from the treaty text or from the negotiations itself. In 1972 the United States and the Soviet Union clearly created a contract not to develop, not to test, not to deploy mobile or space-based ABM systems, and they agreed to that in perpetuity.

Second, testimony from the then Foreign Relations Committee Chairman Fulbright underscored what Senator Nunn recently affirmed in his own detailed analysis of the ratification proceedings. In 1972 the Senate acted to approve the ratification of the ABM Treaty on the basis of a clear understanding of the treaty's content and purpose, an understanding entirely consistent with what the negotiators had in fact negotiated.

Third, testimony from two of this Nation's truly preeminent constitutional authorities, Profs. Louis Henkin of Columbia and Lawrence Tribe of Harvard, underscored the Constitution's clear imperative that the ABM Treaty, like any other treaty, be interpreted in a manner consistent with, and only in a manner consistent with, the understanding of the U.S. Senate when it consented to ratification.

To provide a Senate vehicle for affirming these propositions, I consulted with a number of constitutional scholars while drafting Senate Resolution 167, the so-called ABM Treaty Interpretation

Resolution now pending before the Foreign Relations Committee. I urge my colleagues on and in the Senate, as they consider this resolution, to do so independent of their vision of SDI, their vision of arms control or of United States-Soviet relations.

First and foremost, this resolution is about the Constitution. For never before in American constitutional history has a President sought to revise unilaterally and fundamentally the meaning of a treaty.

In our second joint hearing State Department Legal Adviser Sofaer sought to justify this action by proferring a novel theory of treatymaking. According to Judge Sofaer, "When the Senate gives its advice and consent to a treaty, it is to the treaty that was made irrespective of the explanations provided by the Executive to the Senate."

In other words, a treaty means what the President and the foreign power privately agreed at the time it was negotiated. The treaty's text and the Senate's understanding of what it was approving are irrelevant even if the President may have withheld critical records or otherwise deliberately misled the Senate.

While we must be impressed by Judge Sofaer's audacity in propounding such a theory, it defies not only the Constitution but all reason. The Sofaer theory, if adopted, would not only violate the Senate's constitutional role in treatymaking, it would also severely damage the American Presidency by undermining any Presidents' ability to negotiate treaties in the expectation that he could gain Senate consent.

Consider the practical realities. Were the Senate to be guided by Judge Sofaer's theory that only formal conditions on a treaty have any interpretative meaning, the Senate would inevitably be led to redraft every single significant treaty or else attach to each such treaty such a multiplicity of conditions that subsequent ratification by the parties would become well-nigh impossible.

Such dangers, I trust, do not lie in wait. For clearly, as a matter of constitutional law, the Legal Adviser's theory is wrong. He states that "When [the Senate] gives its advice and consent to a treaty, it is to the treaty that was made." This presupposes that the President unilaterally makes treaties with foreign nations which the Senate is then asked to ratify. But the Constitution provides otherwise. The President has the power, as the Constitution states, "to make treaties" only "by and with the consent of the Senate, provided two-thirds of the Senators present concur." No treaty is made until the Senate has given its consent, thereby permitting the President to ratify the treaty. By this means—and only by this means—the treaty becomes part of the "supreme law of the land."

What the Legal Adviser argues—that superpower treaties are made by the President and the Soviets—is tantamount to saying that President Nixon made the ABM Treaty the supreme law of the United States with the advice and consent of the Soviet Union. Obviously, this is not the case.

The ABM Treaty that became the supreme law of the land in 1972 was a treaty to which the Senate gave its consent. To allow an administration 15 years later to confer upon that treaty a different meaning would be to allow the Executive to make treaties without the advice and consent of the Senate, which is unconstitutional.

In a written response to a Time magazine account of his testimony before us, Judge Sofaer complained that Time had distorted his views. We asked Judge Sofaer to render his views on Senate Resolution 167, which focuses on the requirements of the Constitution. And clearly in his testimony that was what Judge Sofaer gave every indication he was doing. Yet in his letter to Time, Judge Sofaer complained that, when he asserted to these committees the irrelevance of what the President tells the Senate during the ratification proceeding, he was referring only to the international legal dimensions of treaty-making.

One might easily draw the conclusion that Judge Sofaer has a severe case of repudiation-itis. First, in February, after Senators Levin and Nunn had revealed that his legal work was severely flawed, Judge Sofaer repudiated an analysis on which he had relied for months, blaming "young lawyers" on his staff. Now, in his letter to Time, Judge Sofaer has repudiated the essence of his testimony to these committees, claiming that he was not really addressing himself to the prime issue at hand—the requirements of the Constitution as they relate to the interpretation of this treaty—but only to international law.

In this ABM debate, as Judge Sofaer shifts from one position to another and discards arguments one after another, he reminds me of a cross-eyed javelin thrower. You don't know where he is gong to come down, but he certainly keeps everyone's attention.

But even Judge Sofaer's latest ploy—the assertion that the alleged irrelevance of the Senate pertains only to international law—is unpersuasive.

Judge Sofaer voices concern that adoption of Senate Resolution 167 would make the traditional interpretation of the ABM Treaty binding only on the United States, and not on the Soviet Union. But this concern is wholly and extremely hypothetical. The Senate is not trying to impose on the United States an obligation in excess of that accepted by both the United States and the Soviet Union in 1972, nor an obligation to which the Soviet Union does not deem itself bound today. Senate Resolution 167 would do no more than assert that any pursuit of the SDI based upon the so-called "reinterpretation" would constitute a clear and intentional breach of a treaty to which the United States has committed itself in full accord with international law.

Judge Sofaer also purports to find S. Res. 167 unworkable because it presupposes that nations take cognizance of the governmental activities of other nations. How, he asks, can we expect the Soviet Union to be aware of the ratification process in the U.S. Government? But surely this alleged concern is the weakest of reeds. With the Soviet Union having shown ample ability to learn everything it wants to learn about us, and even what this administration does not wish it to learn, it is hardly too much to expect that the Kremlin will be aware of the public deliberations of the Senate on such matters of importance and direct interest to them. Indeed, no one can truly doubt that the Soviets came to the negotiating table well aware that any treaty they would make with the United States must satisfy the Senate as well as the Executive, and that these two institutions together determine the making of treaties under our Constitution.

In the final analysis, Judge Sofaer's assumption of Soviet stupidity is as persuasive as his assertion that the President can constitutionally make treaties which have meaning that the Senate did not know.

As regards the administration's refusal to allow Mr. Graham and Mr. McNeill to appear, one need only ask why would the administration want to block the testimony of the general counsel of ACDA? The answer lies in a recent memorandum written by Judge Sofaer to Secretary Shultz, dated February 2, 1987. In this memo Judge Sofaer essentially denounces the ACDA general counsel for his heretical views on this matter. What are these views? According to the Sofaer memo, "ACDA General Counsel has previously taken positions on the Treaty that have been rejected by the administration, particularly that the language is clear on its face and that the negotiating record establishes the narrow view."

And what about the Assistant General Counsel in the Defense Department? According to the press reports, in October 1985, when Judge Sofaer was conducting his reinterpretation analysis, the DOD's General Counsel's office prepared a study of the negotiating record that also supported the traditional interpretation. Could it be that Mr. McNeill, as Assistant General Counsel for International and Intelligence Affairs, was responsible for that study?

Obviously, the administration is suppressing the views of those who disagree with Judge Sofaer's conclusions and seeking to prevent a fair and open debate in the U.S. Senate on this critical issue. To deal with these tactics, the committee may wish to use subpoena power so that the Senate can receive an objective airing of views. For now, however, the absence of these witnesses may provide even more eloquent testimony on this issue than their actual appearances.

Mr. Chairman, may I take the opportunity to wish Mr. Rovine a happy birthday. I understand it is his 50th birthday. This is one heck of a way to spend your birthday, but I appreciate your being here.

Mr. ROVINE. Thank you very much, Senator Biden.

Chairman PELL. Senator Helms, do you have an opening statement?

Senator HELMS. Mr. Chairman, thank you very much.

I do not want to be a party pooper, but I believe that the basic premise of our hearings today is simply wrong—namely, that we can somehow find the "true" interpretation of the ABM Treaty by reference to what individual Senators throught they were voting on at the time, or even what the committee thought was the meaning.

As Prof. Louis Henkin wrote in 1972, "Attempts by the Senate to withdraw, modify or interpret its consent after a treaty is ratified have no legal weight; nor has the Senate any authoritative voice in interpreting a treaty or terminating it." [Foreign Affairs and the Constitution, p. 136]

The fact is that treaty law is not like statutory law. In statutory law, legislative history can make a difference, and a court may decide to rely upon legislative history in interpreting the original intent of the drafters of that statute.

But in treaty law, interpretation of treaties is derived from the language of the treaty articles and from subsequent practice of the parties. The work of the witnesses we will hear today may be found in the preparatory documents and record of negotiations. These documents may tell us how we got to the treaty, but they do not determine how a treaty is to be applied. Thus the testimony of the gentlemen we will hear today is interesting, but irrelevant.

Mr. Chairman, I am not trying to demean the work of the committee, or the prestige of the witnesses. I just think we are barking up the wrong tree. I have had the minority legal staff working very hard on this issue, and they have already come up with a draft 76-page study. When the draft study is complete, and the Republican members of the committee have had a chance to study it in detail, I intend to make the study available to all Senators and to the public.

Meanwhile, I would like to state briefly some of the preliminary findings of the staff study:

First, the U.S. Senate ratified the ABM Treaty without any amendment, reservation, declaration, or interpretation intended to qualify the obligations of the treaty parties as signed by the President on May 26, 1972.

Second, the Senate rules in effect during consideration of the ABM Treaty were those for the 92d Congress. Review of rules 36 and 37, as in effect at that time—now rules 29 and 30—indicates that the Senate could act only as a body, whether in the procedures for amendment to the treaty text in the Committee of the Whole, or in the procedures for interpretation of the treaty; namely, by amendment to the resolution of advice and consent to ratification. Thus the rules of the Senate, then as now, preclude amendment, reservation, or interpretation affecting the obligations of treaty signatories except by action by the Senate as a body. I am afraid that the opinions of individual Senators, including the Senator from North Carolina, do not constitute legal interpretation.

Third, all of the official documents submitted by, and testimony of the officials who are presumptively authorized to bind the United States in making treaties—the President, the Secretary of State, and the head of the SALT I delegation—are consistent only with a limitation of future-type ABM systems before deployment. Neither in the treaty instrument submitted by the Secretary of State and transmitted by the President, nor in the official testimony of Secretary Rogers and Ambassador Smith was there a single statement explicitly limiting development of future-type ABM systems to a fixed land-based mode.

Fourth, on June 13, 1972, the President transmitted seven agreed statements signed by the heads of delegation, within the treaty instruments. These are within the scope of the resolution of ratification of August 3, 1972, and are within the treaty instruments exchanged between the two governments on October 3, 1972. These agreed interpretations include Agreed Statement D, and other agreed interpretations. The Senate acted upon the ABM Treaty, including Agreed Statement D, as a body, in accordance with Senate rule 37. Agreed Statement D establishes a duty, in event that ABM systems or components based on other physical principles "are created in the future":

> In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in article III of the treaty * * * specific limitations on such systems and their components would be subject to discussion in accordance with article XIII [establishing the Standing Consultative Commission] and agreement in accordance with article XIV [for amendment] of the treaty.

Fifth, Senate rules in effect during the 92d Congress, as now, require for amendment, reservation, or binding effect of an interpretation of a treaty more than the mere interpretative declaration of either an individual witness or a member of the Senate in the course of hearings or during floor debate, unless the Senate ratifies this interpretation by amendment of the treaty or by reservation contained within the resolution of advice and consent to ratification. [See Rule 37, 92d Congress.]

Sixth, interpretative declarations of witnesses or Members during hearings of the Committee on Foreign Relations or the Committee on Armed Services have no effect upon legal duties under a treaty with an unqualified resolution of advice and consent to ratification. The main evidence of the Nunn report is irrelevant to the role of the Senate in treaty formation. The Senate must act as a body, as in the Committee of the Whole, or as the Senate, to affect the obligations under a treaty. The rules of the Senate, together with customary practices under the rules, as amended, established that the internal deliberations of committees are not authoritative acts of the Senate for purposes of qualifying obligations under a treaty pursuant to Senate Rule 37—in 1972, now revised as rule 30.

Seventh, where the Senate as a body does not condition its consent to ratification upon an amendment, reservation, or qualification of the resolution of ratification, the internal deliberations of a Senate committee may have only a supplementary, probative value to ascertain the meaning of the terms of a treaty, if the meaning of the terms in the treaty instuments, as supplemented by the generally more pertinent preparatory work of the treaty, remains unclear.

Eighth, when the terms of a treaty are explained by a report of a committee of the Senate, the report of the committee is neither binding upon the United States nor on other parties, but it may constitute a supplementary means of ascertaining the agreement of the parties. The Senate Committee on Armed Services did not issue a report on the ABM Treaty. The Senate Committee on Foreign Relations issued a report in July 1972. It expressly treated "future exotic types" of ABM systems in a brief summary at pages 3 and 4. It stated that exotic types of ABM systems "may not be deployed even in permitted areas." It specified no limitation on the development or testing of future exotic types; it only explained the treaty as prohibiting deployment.

Ninth, the debate on the ABM Treaty on the floor of the Senate occurred subsequent to inconsistent testimony of officials testifying before committees: The Secretary of State, head of the SALT I delegation, and Chairman of the Joint Chiefs of Staff identified the deployment phase as the first prohibited phase of future-type ABM systems or components, without specifying any limitation of the permitted mode of basing. Handcorrected testimony of Dr. John S. Foster, an anonymous written response to supplemental questions to Defense Secretary Laird, and various other statements of witnesses indicated that some executive officials who were not present at the negotiations considered that the Soviet Government had acquiesced in limiting development and testing of future-type ABM systems and components to a fixed, land-based mode.

Tenth, notwithstanding notice of alternative interpretations of rights and restrictions upon future-type ABM systems, no Member of the Senate among the 90 Members present, proposed a reservation, binding interpretation, or other amendment to the resolution of ratification. The resolution of advice and consent to ratification passed by a vote of 88 to 2 on August 3, 1972. By passing a "clean" resolution of ratification, the Senate had no reason to and did not instruct the President to communicate any particular interpretation of the obligations under the treaty respecting future-type ABM systems. Even had the Senate acted as a body to qualify its consent to ratification, which it did not, the failure to communicate that qualification to the President, and from the President to the other treaty party, would have the effect of deleting such a qualification from the treaty obligations. It was, in 1972, settled law that a proviso adopted by the Senate to qualify a treaty, if excluded from the instruments of ratification, and not communicated to the other treaty party, would have no legal effect on the other treaty party.

Chairman PELL. Thank you very much, Senator Helms. I think Senator Lugar wished to be recognized. Go ahead.

Senator LUGAR. Thank you very much, Mr. Chairman.

The initial panel in this hearing is to address a very important aspect of the current debate about the interpretation of the ABM Treaty; namely, the proper standards under international and domestic law for the interpretation of treaties and the Senate's role in the treatymaking process.

My understanding of the current state of the law is that where the text of a treaty is not clear on its face, there are several sources of material that are relevant to determining the proper interpretation of the treaty. These include the negotiating record, the subsequent practice of the parties, and the record of the ratification proceeding. It is natural for Senate committees to have a particular interest in the record of Senate ratification proceedings, since they embody the Senate's role in the treatymaking process. But it is also very important that we keep in proper perspective the relative significance of these proceedings in the overall process of interpreting a treaty.

The Senate does have the ability to attach conditions to its advice and consent to a treaty in its resolution of ratification, and the President has an obligation to adhere to them if they are within constitutional bounds. Beyond that, the Senate has a right to expect that the President will give appropriate weight to any understanding expressed during Senate proceedings, just as is the case for material in the legislative record and the statute.

We should not forget, however, that a treaty is first and foremost an agreement between the governments which are party to it. The basic objective of the treaty interpretation is to determine what those parties intended the treaty to mean. The Senate's ratification proceedings may shed light on what one of the parties understood the treaty to mean, but statements made during internal ratification proceedings cannot bind any other party.

In my view the resolution introduced by Chairman Biden does not give a fully accurate portrayal of these principles. It treats the process of treaty interpretation as though it were simply a matter of determining what the Senate understood the treaty to mean during ratification. His resolution says that the negotiating record is not relevant to the meaning of the treaty if the Senate's understanding is clear, and it even says that one may only refer to the text if there is no evidence as to what the Senate intended.

All of this would, of course, come as an unpleasant surprise to other treaty partners who are not bound under international law by what is said in our ratification proceedings and who have every right to rely on what they actually negotiate with us. For our part, the United States would never accept the assertion by another country that it would disregard the treaty text and the record of negotiation in favor of the understanding of the treaty stated in its own internal ratification proceedings.

The Biden resolution purports only to speak to what is required under the U.S. Constitution. Without agreeing with what the resolution says on this point, it simply does not provide in any event an adequate basis on which to make a sensible judgment on how to interpret a treaty. The purpose of a treaty is to establish mutual rights and obligations with a foreign government, in this case the Soviet Union. It does us no good whatsoever to attempt to impose limitations on the President based on what may have been stated during Senate proceedings if the other party will not be bound by those limitations.

Therefore I oppose the Biden resolution. I think we ought to focus our attention on determining whether the administration's views on the ABM Treaty are correct and sensible, taking into account all factors that are relevant under law.

Mr. Chairman, the second panel today, which is to address the question of the interpretation of the ABM Treaty, includes one former member of the U.S. negotiating team who presumably would have views on what the parties agreed to during those negotiations. In this connection it is useful for us to review what has been said recently on this question by another of the U.S. negotiators; namely Ambassador Paul Nitze. I would like to introduce into the record his address on April 1, 1987, at the Johns Hopkins School of Advanced International Studies, which explored this matter at length. In my prepared statement this morning I have highlighted several of the conclusions of Ambassador Nitze that I think are pertinent. These statements represent a clear recollection of one key U.S. negotiator who has had by virtue of his present position with the Government the opportunity to refresh his recollection by reference to the negotiating record. Naturally we will look forward to comparing his recollections with those of other negotiators, but the real issue before us is whether the administration's view of the ABM Treaty has merit, and where the U.S. Government should go from here with respect to the treaty.

I thank you, Mr. Chairman.

Chairman PELL. Thank you very much, Senator Lugar.

Now we will start with the witnesses, and I imagine—I am not sure if chivalry applies or we go from left to right. Does any——

Senator SPECTER. Mr. Chairman, may I say a word or two?

Chairman PELL. Of course.

Senator SPECTER. Mr. Chairman, I think it is important to focus at this stage of the proceedings on what we do not know as well as what we do know. As it has already been outlined, the negotiating record and the subsequent practices are very important in reaching a determination on the interpretation of the ABM Treaty. When we hear from negotiators I believe it is very important at some stage in these proceedings, and perhaps in closed session, that we have access to the airgrams and other documents that the negotiators were working with at the time.

It is fine to hear about present recollection, but the documents that they prepared contemporaneously with the events back in 1971 and 1972 are very important, and so far those documents have not been made public. They have not been made available to the negotiators, and I think it is very important that that be done if we are to really understand the impact of the negotiating record.

The aspect of subsequent practices is also very important, and as of this day we do not have documents available as to those subsequent practices. It is widely rumored that the activities of the Standing Consultative Commission are very relevant to the questions of subsequent practices of the parties and what the parties believe occurred here, and speaking for myself, I have made a strenuous effort to get those documents, and they are as yet unavailable.

And I join with the expressions which have been made so far about the importance of having the Judiciary Committee and the Foreign Relations Committee gain access to witnesses and all the documents so that we can understand all facets of this important matter, and I believe that these hearings are vitally important not only for the important principles of treaty law, international law, and U.S. constitutional law, but because we are going to have to decide in the course of the next several months some very important issues as to what we are going to appropriate on the strategic defense initiative and I am sure that there will be issues before the Senate and the House on limiting the appropriating process to the narrow interpretation if that in fact emerges as the correct interpretation, and it may.

But these are vital issues. I agree with what has been expressed here today about a fair and open debate in the U.S. Senate. I would urge that we not focus too much on Judge Sofaer or any of the participants. I do not think we are in a decathlon. It is not an issue of who can throw a javelin. It is an issue here as to what this treaty means. It has been announced publicly over the past several days that the Soviets have proposed that there be new discussions as to what the ABM Treaty means, and it has been announced that the United States will consider those talks with the Soviet Union, so it may be that the Soviets have some questions that would bear on what we are deciding here because the parties and their understanding is obviously paramount.

There was a delegation of Senators in Geneva last month, discussing, albeit on a formal basis with the Soviet negotiators, and the tone of what I heard Ambassador Vorontsov and others say did not have much concern about the broad or the narrow interpretation. The concern expressed was about the deployment. The concern expressed was that if testing yields to 100 space stations, then the next day after the testing they are in a position to deploy, that it may be critical, but from what I heard the Soviet negotiators say, they may have a very different view about the issue of testing in outer space than the narrow interpretation purports to say.

These are issues which I think we have to get into, and I am hopeful that these hearings will go into closed session where necessary, get all the documents, make contemporaneous documents available to witnesses, and get all the papers before us before we come to a judgment, because the issues here are much too important to have any rush in our ultimate judgment.

Thank you, Mr. Chairman.

Chairman PELL. Thank you very much.

Senator PRESSLER. Mr. Chairman.

Chairman PELL. Senator Pressler.

Senator PRESSLER. May I just join in those remarks? I think it is terribly important that we have access to those papers. Despite all the academic analysis being done, this issue boils down to whether one is for or against the SDI. Although each party justifies its view with lengthy academic backups, the fact of the matter is, we are having a debate on the SDI—whether it should go forward or not and whether this treaty applies or not. People's positions, even without the papers, seem to break down along the lines of pro-SDI or anti-SDI, and that is the basic truth of the matter.

If we are going to have a debate on SDI, that is one thing. But all the gyrations and the academic justifications that people are going through really result from predispositions about the SDI. Therefore, anything we can do to get the actual papers I think would be very important, and I would ask, Mr. Chairman, how we are coming in that area, getting access to those papers?

Chairman PELL. The record—you are not talking about the negotiating record now, you are talking——

Senator PRESSLER. Yes.

Chairman PELL. The negotiating record, as you know, is available in S. 407, and I must say—I glanced at it the other day. Not too many of our colleagues have taken advantage of it being there.

Chairman BIDEN. If I may say, everything is available. It is all there. You can go read it.

Senator SPECTER. But there are very many more papers which we ought to have access to, subsequent practices, and the negotiating record is only one side of it, what came from Geneva and Helsinki to the United States. We do not have the documents that went from the United States back to the negotiators dealing with the Soviets. We have a very incomplete record for any of the judgments which have been made.

Chairman PELL. Senator Adams.

Senator ADAMS. I have just a brief statement, Mr. Chairman. People forget, and many of us were in Congress at that time, that the basis of the ABM Treaty was a great advantage to the United States as well as to the Soviets. It was to freeze the whole operation of moving into outer space. It was to deal with the fact that the Soviets were in a very large civil defense mode, and it was a deliberate decision made by the United States and the Soviet Union to use mutual assured deterrence rather than to go on with incredibly expensive ABM systems.

We built one. We have since closed it down. They built one around Moscow which has not been effective. I am looking forward to the statement of the witnesses, but I think the basic point is, we have a treaty which was to the advantage of both parties and to count how many angles dance on the head of a pin in a legal sophistry over what is a very fundamental arms control document it seems to me leads us down a path toward hopefully developing something that many of our scientists say will not exist for many years. I might state that at this point, if the Soviets wish to reinterpret the treaty, they have more lift, they are in space at the present time with the station, and we are in a position where we should be standing for the traditional interpretation of this treaty. All that we are doing at this point is confusing ourselves and not moving forward with true arms control.

Thank you, Mr. Chairman.

Chairman PELL. Thank you very much indeed.

Ms. Chayes.

STATEMENT OF HON. ANTONIA CHAYES, FORMER UNDER SECRETARY OF THE AIR FORCE, CURRENT PRESIDENT OF END DISPUTE, INC.

Ms. CHAYES. Professor Chayes is in Cambridge teaching a class this morning and could not appear before you, but I am grateful for the opportunity to be here and to present our joint statement. This is a subject about which we have both written and spoken widely, and of course I am available to answer questions. I hope my testimony will not be irrelevant.

In our view, these committees are performing a very important service in undertaking a full review of the evidence and arguments about the proper interpretation of the ABM Treaty, especially as it applies to the development and testing of SDI components and systems. Your work will have an important impact beyond the ABM Treaty in conduct under arms control regimes generally and in deepening the public understanding of the constitutional partnership between the President and Senate in treatymaking.

As Senator Biden said, the 200th anniversary of our Constitution is here, and it is hardly the time to abandon that partnership. Mr. Sofaer posed the central question addressed by the Biden resolution in this hearing. "By what standards should the President or the Senate determine the meaning of a treaty ratified years before the issue of interpretation arises?"

The first answer to that question lies in the text of the treaty. There we find the language to which the President, the Senate, and the Soviet Union all agreed. And that is where we are directed to look by international law. Article 31 of the 1969 Vienna Convention on the Law of Treaties, accepted by the United States as reflecting customary international law, and incorporated in the new Restatement of Foreign Relations Law, states as a general rule of interpretation, and I quote, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

So, what I would like to do first this morning is to refocus attention on the text of the treaty. The overall scheme and language of its specific provisions embody in no uncertain terms the traditional and historic interpretation. The ABM Treaty prohibits development, testing, and deployment of space-based systems or components. Article 5 of the treaty, the core of the interpretation issue, is unambiguous and straightforward: "Each party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based."

Mr. Sofaer argues, however, that the words "ABM systems or components" cover only systems using 1972 technology, even though the treaty is expressly of indefinite duration. Mr Sofaer purports to find this kind of limitation in the treaty's definition of ABM systems in article 2, and I quote: "For the purpose of this treaty, an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of ABM interceptor missiles, ABM launchers, and ABM radars."

On the contrary, this definition is the mainstay of the historic, traditional interpretation. It is a generic definition of an ABM system in terms of its function, countering strategic ballistic missiles or their elements in flight trajectory. Article 2 goes on to describe the components of then current ABM systems. The word "currently" makes it clear that this description is an illustration of the generic definition, not a limitation. Otherwise, it would have made no sense to use the word.

In his first presentation of the reinterpretation before the Arms Control Subcommittee of the House Foreign Affairs Committee in October 1985, Mr. Sofaer said, and I quote, "Article 2 can be more reasonably read to mean that systems contemplated by the treaty are those that serve the function and that are currently consisting of listed components."

In other words, he tells us do not worry too much about that word "currently" or the comma that precedes it, and add an "and" to the text. But the draftsmen of the treaty very carefully chose their words. From Dr. Gartoff, who has written on it, the delegation secretary, and other sources, we know exactly why the word "currently" was inserted in the text of article 2. It was done toward the end of the negotiations to resolve specific drafting problems and to record the understanding of both parties that the treaty in fact applied to exotic systems that might be developed in the future.

It established clearly the intention to employ a functional definition covering all systems whose function is to intercept ballistic missiles or their elements in flight trajectory, whatever technology they might employ.

Textual analysis of other treaty provisions bolsters this commonsense reading of article V as a comprehensive prohibition against testing development and deployment of space-based exotic systems.

Article III as amended by the 1974 protocol limits deployment of ABM systems to one fixed land-based site on each side. It starts with a broad prohibition, "Each party undertakes not to deploy

ABM systems or their components except as permitted in this article."

It thus prohibits all deployments except those that were specified in article III. Subparagraphs (a) and (b) describe the deployment at the single permitted site in terms of those 1972-type launchers, missiles, and radars; limited in area, limited in firepower and radar capability.

Since by the terms of the article everything that was not specifically permitted is prohibited, any deployment of systems based on other physical principles is implicitly barred at the permitted sites.

Now let us look at the famous Agreed Statement D. It says, "In order to ensure the fulfillment of the obligation not to deploy ABM systems and their components except as provided in article III, the parties agree that in the event ABM systems based on other physical principles and including elements capable of substituting for ABM interceptor missiles, ABM launchers, and ABM radars are created in the future, specific limitations on such systems and their components will be subject to discussion in accordance with article XIII"—that is the Standing Consultative Commission—"and agreement in accordance with article XIV"—which is the amending provision of the treaty.

So the inducing clause "in order to ensure the fulfillment of the obligation in article III" tells us that Agreed Statement D is directed toward the permissible fixed land-based systems.

A major function of agreed statements generally is to clarify or make express something that is only implicit in the treaty. Agreed Statement D makes explicit the prohibition on deployment of exotic futuristic systems that otherwise is only derived inferentially from the language of article III.

According to the legal adviser, however, the agreed statement had no such modest function. He would have us believe that an agreed statement tacked on at the end of a 2-year treaty negotiation imposed a new, far-reaching substantive prohibition.

If he is correct that until that late moment not only were space-based exotic systems but also sea-based, air-based, and mobile land-based systems, those could have been freely tested, developed, and deployed under the treaty. Even more absurd, it means that, again until that last minute, the treaty would have allowed exotic systems to be deployed everywhere but at the one fixed land-based ABM site permitted by article III which, as shown above, was confined quite clearly to conventional technology.

In other words, you are limited as to what you can deploy under article III and then until Agreed Statement D was written, anything else could have been deployed anywhere else in either nation.

Mr. Sofaer's interpretation not only controverts the express purpose of the treaty, but it leaves it without any intelligible purpose whatsoever. Article I of the treaty states, "each party undertakes to limit antiballistic missile systems and not to deploy systems for the defense of the territory of its country."

If Agreed Statement D was an afterthought, 2 years of hard negotiation and 15 articles would have left the Soviets in a position where they could break out of the treaty without even exercising their withdrawal right, because testing and deployment of systems embodying emerging technologies would have been freely permitted until Agreed Statement D was written.

Accounts of the negotiations show that the United States negotiators were constantly concerned about Soviet breakout and drew the line of permissible activity as far back as possible from the point of deployment. Articles II(2) and V deal not only with deployment but also with testing and development. Article VI addresses United States concerns that Soviet air defenses might be upgraded to ABM-capable systems.

Other provisions prohibit multiple warhead and rapid reload ABM's. Early warning radars are limited so that they cannot provide a base for a battle management system.

Mr. Sofaer proposes that United States negotiating concerns with Soviet breakout only apply to breakout of 1972 systems and totally ignore systems based on other physical principles that might be developed in the future.

I invite you, Mr. Chairman and members of the committee, to imagine what the United States reaction would have been if the Soviet Union had proposed this reinterpretation of the treaty and blithely announced that it was going to conduct such tests in space.

Now, you have heard a great deal about the ratification record of the ABM Treaty, and we are going to spend only a few moments on it. The ratification record is public. The Secretary of State and other senior executive branch officials, in presenting the treaty to the Senate, stated their understanding of the meaning of the treaty.

That understanding reflects the ordinary meaning to be given the terms of the treaty. It was fully comprehended by the Senators who heard or read these presentations. They asked precise and detailed questions to which they got precise and detailed answers.

All this is set forth in detail with appropriate citations in our Harvard Law Review article and Senator Nunn's comprehensive and scholarly report on the ratification record and his testimony of March 11.

At the last hearing, Senator Biden drew attention to the conclusion of a colloquy between Senator Jackson and Johnny Foster, who had been director of defense research and engineering. After extensive questions and answers specifically exploring the treaty prohibition against space-based testing and development of exotic systems, Senator Jackson stated equivocally, I understand.

That understanding was consistently adhered to by the United States without any challenge from the Soviet Union until October 1985, when Mr. Sofaer abruptly unveiled his reinterpretation.

Against this background, let us revert to Mr. Sofaer's question: By what standards should the President or the Senate determine the meaning of a treaty ratified years before the issue of interpretation arises?

Of course, he says, the President has authority to interpret a treaty. Section 321 of the revised Statement of Foreign Relations Law says, "The President has authority to interpret international agreements for the purpose of U.S. foreign relations, since he is the sole organ of the United States in its international relations and is responsible for carrying out agreements with other nations. The Senate, whose consent is necessary before the United States can conclude a treaty, has no part in the implementation of the treaty after it is made, but the understandings expressed by the Senate in the process of giving its advice and consent have to be respected."

There is no debate on this issue. The real issue is by what authority this President presumes to alter the well-settled interpretation endorsed by his three immediate predecessors corresponding to representations made by the Executive to the Senate at the time of ratification and clearly understood by the Senate and consistent with the actions and public statements of both parties over 13 years of practice.

According to Mr. Sofaer, the solemn statements of the senior responsible Cabinet officers, communicated to the Senate as a basis for its advice and consent, understood and agreed to by the Senate in committee hearings and floor debate, acted on continuously since then until late 1985, and fully consistent with the language of the treaty, have "some probative value" on issues of treaty interpretation but not very much.

Unless the Senate gets it in writing, according to Mr. Sofaer, in the form of a reservation or understanding, its participation in the treaty process as mandated by the Constitution is illusory except for the final vote. He argues that a future President can ignore the representations of his predecessors and the understanding of the Senate.

Mr. Sofaer's discussion of a law of reservations and understandings is unexceptional but inapplicable to the present case. Of course, if the Senate has any serious question about the meaning of the language of a material provision, it will introduce a formal understanding clarifying the matter. Sometimes it is called an interpretation.

According to the 1978 Senate Foreign Relations Committee memorandum cited by him, an understanding is a statement which is not intended to modify or limit any of the provisions of the treaty in its international operation but is intended merely to clarify or explain or deal with some other matter incidental to the operation of the treaty in a manner other than a substantive reservation.

The absence of such an understanding here indicates that the Senate felt no need to clarify or explain or deal with any matter incidental to the operation of the treaty. Both the meaning and the operation of the treaty were clear from the text. Where the Senate wishes to change the meaning of the text presented by the President, it will do so by means of a reservation incorporated in the resolution of advice and consent (and I quote:

> A reservation is a form of declaration by a state when signing, ratifying or adhering to a treaty which modifies or limits the substantive effect of one or more of the treaty provisions as between the reserving state and other states party to that treaty.

Here, the Senate had no intention of modifying or limiting the substantive effect of the ABM Treaty as written. There was no occasion for reservation.

The discussion of the Panama Canal Treaty and SALT II in Mr. Sofaer's statement shows how very sophisticated and sensitive the Senate is in its use of these instruments to resolve disputed issues of treaty interpretation or to require renegotiation of the treaty commitment initially accepted by the Executive.

It is certainly true that when the Senate does use these devices, they are binding as to the meaning of a treaty.

Chairman **Biden**. Excuse me, Mrs. Chayes. I am concerned that someone may object to the Senate meeting beyond 12 p.m., and we have a series of witnesses.

Is it possible to summarize your statement? We usually limit it to 10 minutes. It is very useful, and we will put it in its entirety in the record; but I am concerned that we are not going to be able to——

Mrs. **Chayes**. Yes, let me summarize it in a few more minutes.

None of it really says what the Senate is to do in this case, where there is no dispute about the meaning of the text and no reason to change the meaning. To say that in such a case a subsequent President does not have to consider the Senate understanding revealed by the ratification—and this is the main point—that only a formal understanding will do, is really to stand the Constitution on its head.

I want to make the point that Mr. Sofaer's description does not reflect U.S. constitutional law in practice, and I will cite section 314 of the revised Restatement of Foreign Relations Law, where it says, "although the Senate's resolution of consent may contain no statement of understanding, there may be such statements in the report of the Senate or in the Senate debates, in such case the President must decide whether they represent a general understanding by the Senate, and if he finds that, you must respect them in good faith."

That is a section of the restatement that Judge Sofaer omitted.

So, it would be really wrong to suppose that the interpretive practice under the U.S. Constitution leads to different results than the practice under international law. What I have quoted is the practice under international law.

The system prescribed by the legal adviser is not only unsound in law, it would be unworkable in practice, and I will finish with that. What he is saying is that the Senate has an affirmative obligation to state how it interprets every provision of every treaty. The resolution of ratification would have to include an endless series of understandings and interpretations about matters that were not in dispute in order to insure that a President 15 years later would not be free to disregard the unambiguous and agreed meaning of the text.

The burden of this would be intolerable. It would rebound back to the President and make any future agreement almost impossible to negotiate.

On the negotiation record, of which I also know a great deal, I would be glad to respond to questions. I will just stop there.

[The prepared statement of Mrs. Chayes may be found in the appendix.]

Chairman **Biden**. Thank you. Thank you very much.

I should note also that regarding your reference to the Restatement of Foreign Relations Law, Professor Henkin, the chief reporter, testified to the same point you did with regard to Judge Sofaer's notion of the requirement of formal understandings.

Our next witness to testify is Mr. Rovine.

STATEMENT OF ARTHUR W. ROVINE, ESQ., BAKER & McKENZIE, NEW YORK, NY, FORMER ASSISTANT LEGAL ADVISER FOR TREATY AFFAIRS, DEPARTMENT OF STATE

Mr. Rovine. Thank you, Senator Biden. I am honored to testify before you today on questions of treaty interpretation and proposed Senate Resolution 167. I am here to testify only as regards principles of treaty interpretation.

Chairman Biden. If I could ask you to keep your statement to 10 minutes.

Mr. Rovine. I will.

I will not be testifying on the ABM Treaty itself or on arms control generally. I am currently a partner at the international law firm of Baker & McKenzie in New York, but I speak to you as a former Assistant Legal Adviser for Treaty Affairs in the State Department, a post I held for 6 years, followed by 2 years as the first U.S. Agent to the Iran-U.S. Claims Tribunal in The Hague.

My first concern regarding the issues which form the subject of these hearings is that, in my judgment, too much is being made of the lawyers' debate as to the proper interpretation of the ABM Treaty. As a treaty lawyer or certainly a former treaty lawyer, I think it is fair to say that interpretations or reinterpretations of treaties long in force are normally inappropriate approaches for decisionmaking on questions of fundamental public policy, especially basic issues of strategic doctrine and arms control that have been with us for many years.

The decision whether or not to pursue the strategic defense initiative, it seems to me, is not a matter that should very much engage the energies of lawyers. It is not a lawyers' debate, or should not be, but is rather for those who are expert on arms control and strategic doctrine.

I think we have to decide on fundamental policy in this area, and then the proper treaty and statutory law follows suit. I think these policy considerations have to be debated openly and honestly and decisions then made reflected in the law in both treaty and statute. We make our treaties to follow policy decisions and not to precede them.

I regret that it is necessary or is felt necessary to have any debate on principles of treaty interpretation in the context of the ABM Treaty and that the issue of Executive and Senate prerogatives has become part of a national debate on strategic doctrine. I think those subjects go together very badly, and I think we should do our best to keep them apart.

Having said that, I am nevertheless asked for my view concerning the proposed Senate Resolution 167. The first point that strikes a treaty lawyer here in the discussion today is the short shrift accorded to subsequent practice in the interpretation of treaties.

Both the executive branch presentations and the proposed Senate Resolution 167 address primarily the negotiating record and the ratification process in order to determine the proper meaning of a treaty. I think the emphasis is mistaken. Senate Resolution

167 in section 6 does address subsequent practice, but the key sections (2) and (a) do not, and I think that is unfortunate.

Under Article 31 of the Vienna Convention on the Law of Treaties, of course, a treaty is to be interpreted in accordance with the ordinary meaning to be given its terms and context and in light of the treaty's object and purpose.

Account is also to be taken, however, under that article and most importantly, of any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

If, upon looking at sources of guidance and the treaty text and agreements concluded at the time, you have a result which is obscure or ambiguous or unreasonable, then pursuant to Article 32 of the Vienna Convention, recourse may be had to what are called "supplementary means of interpretation." These supplementary means of interpretation include the preparatory work of the treaty and the circumstances of its conclusion. Those phrases include, in my judgment, the negotiating record and the ratification process.

I should say a word here about the phrase "negotiating record." That, in itself, is an ambiguous phrase. There are agreed negotiating records; that is, a record of negotiations agreed to by the two or more parties who have put together a treaty. There are also negotiating records that are not agreed, that are simply statements by one party of its view of the negotiations or documents that it has written or that it is pointing to as part of the negotiating record. The phrase is ambiguous, and that factor should be taken into account.

My point here is that you reach that negotiating record, whatever the phrase means, and you reach the ratification process of a treaty as a means of interpreting its meaning, once you have reviewed the subsequent practice along with the text and you have still found the meaning to be ambiguous or obscure.

Now, this may be a very different process from statutory interpretation, but that is how it is done with treaties according to the Vienna Convention. I think it makes more sense in accordance with the rules to examine practice at least along with that negotiating record. The practice to be examined would cover the period from the entry into force of the treaty to the date the question of the treaty's meaning was initially raised. In this case, I take it it would be October 1985.

I think treaty lawyers have long understood that how the parties apply a treaty in practice may be far more persuasive evidence of their intent as to the meaning of that treaty than words exchanged in the negotiation and ratification process. Actual behavior in actually applying a treaty over time may well be more persuasive than words even in the negotiations or ratification which only describe the treaty.

So if the proper emphasis, then, is accorded to subsequent practice, then it would seem clear that at least certain provisions of Senate Resolution 167 would need to be amended. Section 2(b) does not focus at all on subsequent practice but rather only on the text of the treaty as reasonably construed in light of its context and object and purpose. It is appropriate as far as it goes, but in my view it is incomplete.

Subparagraphs (a) and (c) in section 8, subparagraph 1, also focus only on the negotiating process and the ratification process and on interpretations communicated to the Senate by the Executive. These are appropriate, but they ignore the subsequent practice of the parties. I think to that extent, they are misstatements of treaty law.

Chairman BIDEN. Misstatements or incomplete statements?

Mr. ROVINE. Well, if taken literally at face value, just on their face I would say they are misstatements. You would need correction to make it a proper statement of the law.

Next, in reviewing this debate I have been struck by the fact that the role of the judiciary has been largely ignored. Clearly, the meaning of a treaty is ultimately what the Supreme Court of the United States determines the treaty to mean. The judiciary is the ultimate arbiter of what any law of this land means, despite the fact that the judiciary was not involved in the negotiation of the treaty and was not involved in the approval process. That is true with respect to any law.

So again, if taken at face value the statement in section 2, subparagraph 2(a), that the meaning of the treaty is what the Senate understands the treaty to mean when it gives its advice and consent, is on its face not correct.

It may be unlikely that the courts will be in a position to express their authoritative view as to the meaning of the treaty.

It is not, however, impossible. I cite the case of Senator Goldwater who did have standing in the *Mutual Defense Treaty* case with Taiwan. He felt he had been deprived of his right to vote and had standing on that ground. So, too, I suppose, if a Senator felt that the President was implementing a treaty other than the one that he had voted to approve or a treaty which he never got to vote on at all and it was very different from his understanding, he might well argue that he had been deprived of his right to vote.

The Goldwater case, I would note, also went fast. From beginning to end, including a district court opinion, a court of appeals opinion and a Supreme Court opinion, it took less than 1 year.

Now, I am not suggesting that a Senator will get the result he wants, especially since the courts of this country normally accord great deference to the manner in which the Executive interprets a treaty; nor am I suggesting that litigation is the best way to resolve disputes of this kind, especially in light of the very substantial political content of the questions involved here.

I cite the role of the judiciary here simply to indicate that this struggle between Executive and Senate as to the meaning of a treaty appears to be based upon the mistaken view that the judgments of the one or the other are ultimately authoritative. That is not true. In the end, it is the view of the Supreme Court that counts with respect to any law.

Finally, assuming that we do wish to focus only on the supplementary means of interpretation such as the negotiating record and the ratification process, and assuming further that there is no authoritative determination by the courts as to the meaning of a treaty, then we come to the Executive/Senate debate on treaty power which so unfortunately forms the core of the questions before us today.

In this rather narrow context, I think it is necessary to examine the difficulties raised by the distinction between treaty as domestic law and treaty as a legal relationship between two countries. It is so that for purposes of the international law side of any treaty relationship, our treaty partners cannot be expected to examine very closely our internal processes, and we would certainly not feel bound to inquire too closely into theirs.

It is so that under international law the primary question is what the two Executives have agreed to, what is the meaning of the treaty or the agreement that they have concluded.

At the same time, the executive branch and the judiciary may not, in my judgment, properly rely on a secret negotiating record that is substantially inconsistent with the fundamental and accepted meaning of a treaty. If the meaning of a treaty could be derived from secret negotiating records which are inconsistent with fundamental and accepted meanings of the treaty the Senate has debated and approved, then Senate advice and consent to ratification would not have any meaning and, importantly, the Executive could not fairly say to its treaty partner that the Senate had given its advice and consent to ratification.

These problems, in my judgment, only bring us back to subsequent practice as a primary and perhaps the best means of interpretation. A consistent subsequent practice accepted by both parties and accepted by the Senate over the years until a question is finally raised will give us an interpretation of the treaty that overcomes the ambiguities, if there were any, in the negotiation process and in the ratification process.

If the subsequent practice is clear over the years and if both the Executive and the Senate have accepted that practice without objection, then we no longer have the issue of an inconsistent understanding with the Senate on the one hand and the foreign treaty partner on the other at the time of the negotiation and conclusion of the treaty.

Given that accepted subsequent practice, the treaty partner, the Executive, and the Senate have all been in agreement as to the meaning of the treaty. The key players are all aboard the same treaty and they have been over a period of years.

If there is to be a Senate resolution on this subject, I would hope that its text would take into account these views, but returning to my original concern, I would hope that the examination of fundamental strategic arms control doctrine in this country would go forward on the basis of policy considerations, and that once we have a consensus on what we wish to do in this area the appropriate legal arrangements would follow.

Thank you very much.

[The prepared statement of Mr. Rovine may be found in the appendix.]

STATEMENT OF LEONARD C. MEEKER, FORMER LEGAL ADVISER, DEPARTMENT OF STATE, WASHINGTON, DC

Mr. **Meeker**. Thank you, Mr. Chairman. I will be very brief.

First, I want to state most strongly my disagreement with any proposition to the effect that the law and questions of treaty interpretation are to follow from and be patterned upon policy decisions about SDI. That is just what the Reagan administration seems to have been doing during the last 18 months. I think it is unacceptable and not compatible with a government of laws.

The Anti-Ballistic Missile Treaty with the Soviet Union was negotiated and concluded by President Nixon in 1972. This action was taken out of a conviction that a ban on ABM weapons would be in the interest of the United States and would enhance our defense and security. This is a consideration which Senator Adams has already spoken about this morning.

The design of the ABM Treaty is really straightforward. It is not obscure. Articles I, II, and V prohibit the development, testing or deployment of defenses against ballistic missiles. The only exceptions to the prohibition are set forth in articles III and IV. These authorized fixed ground-based defenses at a limited number of agreed sites.

Agreed Statement D attached to the treaty incorporates one more element. If defenses should be created in the future that are based on new physical principles other than those current in 1972, such defenses could not be deployed at the fixed ground base sites without consultation and agreement between the two countries.

The purpose, the design, and the provisions of the ABM Treaty are plain. It prohibits development and testing as well as deployment of any ballistic missile defenses that are air-based, space-based, sea-based or mobile land-based regardless of the technology used. In other words, no development or testing of such defenses except for systems and components that are fixed land-based.

All the principal American negotiators agreed on this understanding of the treaty. Only one of them, Ambassador Paul Nitze, now Senior Arms Control Adviser to President Reagan and Secretary of State Shultz, changed his mind late in 1985 under the coaching of State Department Legal Adviser Abraham Sofaer.

When the treaty was submitted to the Senate in 1972 by the Nixon administration, it was presented with the original understanding. That was the treaty that was put before the Senate and on which the Senate voted. If the Senate wanted to impress some other understanding on the ABM Treaty, it would have to record this formally in a reservation or understanding, and this would then have to be communicated to the Soviet Union as the other party and would have to be accepted by the Soviet Union.

The Senate did not do this. Instead, it accepted the original understanding which the administration then presented to the Senate.

Now, Judge Sofaer has urged in an earlier stage of these hearings on March 26, 1987, that it is the function of the executive branch to interpret a treaty after it has been ratified. A reasonable view would hold that such a function may properly extend to questions which arise for the first time subsequent to ratification and which were not addressed when the treaty was before the Senate.

Interpretation, however, must be in good faith and in accordance with the language and purpose of the treaty, and the function of interpretation is not to be stretched or distorted so as to turn the treaty upside down.

The Reagan administration now proposes that the ABM Treaty prohibiting ballistic missile defenses be interpreted so as to permit the development and testing of such defenses with the sole proviso that they be based on up-to-date Star Wars technology, this despite the plain language of the treaty, its negotiating history, the record of Senate consideration and the subsequent practice of the Soviet Union and the United States under the treaty.

No President, no Senate would give approval to an instrument constituting such a delusion and sham. That was not what was negotiated in 1972. It was not the treaty to which the Senate gave its advice and consent. To seek now, 15 years later, to foist such a sham on the Congress and the American people is preposterous. The Constitution does not allow such manipulation.

For all these reasons, I am in full accord with the thrust of Senate Resolution 167 which has been introduced by Senator Biden.

Thank you very much for this opportunity to appear. I would be glad to try to answer any questions which members of the committees may have.

Chairman BIDEN. Thank you, Mr. Meeker. I would like to say one thing at the outset, and I assume we are limiting ourselves to 10 minutes in the questioning period. I will not take all of that 10 minutes.

As much as some of my colleagues and some witnesses wish to portray it, the question is not whether you are for or against the ABM Treaty any more than being for or against President Nixon was the issue in the tapes case. We heard the same kind of arguments at that time. It was said then that you are either for or against Nixon in the Presidency, that it is not a constitutional issue. But it was. And so is this.

It is a constitutional issue, and there is a potential for a constitutional crisis being precipitated here.

Mr. Rovine, you intrigue me with the notion that you wish that we just settle the issue of SDI over here as a policy matter. But the fact of the matter is, just like in the Nixon tapes case, the constitutional issue is facing us. People against Richard Nixon were hoping that the Supreme Court would rule the way they did. People who were for Richard Nixon were hoping they would not rule the way they did. But in truth it should have been totally irrelevant whether they were for or against Richard Nixon. And today it should be totally irrelevant whether they are for or against the SDI. This is a constitutional problem. As much as we would like it to go away, it cannot be done.

The President had an easy way out. If he does not wish this treaty to impact upon SDI, and if he wishes to avoid a constitutional crisis, he can exercise the provisions of the treaty, and he can say I now believe it is inimical to the interest of the United States of America to continue to abide by the treaty; ergo I am exercising my power to withdraw from this treaty within 6 months.

If he wants out, nothing will stop his Star Wars proposal except our vote in the U.S. Senate on funding. That is it. Nothing else. All he has to do is say I want out, and he is out in 6 months. He is constitutionally out in 6 months.

As it is, we are seeing a bastardization of the treaty process. That is what this is all about. I will yield to my colleague.

Senator SPECTER. Thank you very much, Mr. Chairman.

Mrs. Chayes, you were Under Secretary of the Air Force. Would your view of the treaty interpretation vary at all if you knew that there had been a proposal for article V which would have specified that the parties would not deploy any ABM system which would perform any function of the components previously defined and that the proposal was made by United States negotiators because of concern that the treaty did not cover future exotic systems and that the Soviets at that time resisted having subparagraph 3, and that in fact subparagraph 3 was deleted from article V?

Mrs. CHAYES. I am familiar with those proposals on article V, and I know that is the part of the negotiating history on which the administration rests. In fact, it absolutely illustrates the point that I did not get to in my statement that a negotiation record is a hodgepodge. You cannot take a slice in time of any negotiation and say because the other party rejected certain language that rejection shows the intent of the parties.

The fact is that there was a long negotiation after that rejection of particular language. It resulted in the use of the words "currently consisting of" in Article II to make it clear that the entire purpose of the treaty was to prohibit all systems of whatever technology. In addition, the very specific drafting of Agreed Statement D that referred back to article III in effect, preserved the U.S. land-based laser program that Senator Jackson and others and the military were so interested in.

So, I think that notion of article V—and as I say, I am familiar with it, I have seen it in the classified version—is exactly an example of what is so dangerous about trying to pluck little pieces of a very extensive and confusing negotiating record that is not at all neat like the legislative record before the Senate.

Senator SPECTER. Secretary Chayes, you say you have seen the classified version?

Mrs. CHAYES. Yes.

Senator SPECTER. Under what circumstances did you see it?

Mrs. CHAYES. In connection with some work that I was doing on compliance and in connection with my work on SALT II and the Standing Consultative Commission. We were very concerned about compliance issues with respect to the MX for which I had responsibility, so that we dug into some other compliance issues extensively that had been raised.

Senator SPECTER. At what time did you undertake that study of the record?

Mrs. CHAYES. It was not really a study of the record. During the time that I was Under Secretary, we looked at various classified materials, and I have had reference to them in some classified work that I have done since. I do not hesitate to say that I have not seen the entire record, but I am familiar with the article V discussion of which you speak.

Senator SPECTER. But the work that you did did not enable you to see the entire negotiating record at that time?

Mrs. CHAYES. No, sir.

Senator SPECTER. Well, beyond the hodgepodge and the sloppiness, and I agree with you that there is a hodgepodge and that it goes in all different directions, sort of like Don Quixote, that if you just deal with that one aspect, would you agree that that would tend to negate the narrow interpretation and raise some question about it?

Mrs. CHAYES. No, I do not agree that it would negate the historic interpretation. I do agree that, of course, it would raise some questions, and one would have to probe further into the negotiations to see where it finally wound up and if there is other language where there are other resolutions in different language that supported the position that the Executive thought it had agreed.

Senator SPECTER. All right. So it does not negate the position but it raises a question which would require further analysis. It would raise a question if the United States tried to put in article III that specifically covered other functions and the Soviets came back and said "No, we do not want that because we simply want to deal with what we know about at the present time" and if article III of section 5 is, in fact, deleted, then you would say at least a question is raised and you have to look further to see where the hodgepodge leads.

Mrs. CHAYES. Exactly.

Senator SPECTER. During the course of whatever examination you made of the classified materials, did you have occasion to deal with any materials which dealt with the phrase "currently consisting of" which raised the suggestion that that language was really a grammatical connection as opposed to an effort to include and incorporate every kind of a futuristic system?

Mrs. CHAYES. No. My knowledge of that comes from an unclassified article written by the secretary of the delegation, Dr. Garthoff in an article in International Security in 1979, I believe, which was long before this debate on the interpretation.

Senator SPECTER. Long before the debate?

Mrs. CHAYES. Long before this debate.

Senator SPECTER. Long before this debate and long after the words were used?

Mrs. CHAYES. Yes; it was such an interesting discussion that the word "currently" came out of subcommittee work among the negotiators to really nail down the fact that future systems were covered, I have pursued that in discussions with some of the negotiators to see what their recollection was. They have absolutely confirmed that, and that goes for people who have testified before you, people who are about to testify before you, and others who have not.

Senator SPECTER. Well, unfortunately we cannot get into the classified record, and I restate my hope that I expressed earlier, that we will one day have access to these records, to make them available to the negotiators.

Mrs. CHAYES. I would be glad if anybody wanted me to to review those materials and to give you my conclusions based on a more complete understanding.

Senator SPECTER. Mr. Rovine, I find your testimony interesting, as you emphasized the issue of subsequent practices because that is an aspect of the record which is really virtually totally vacant at this time. When Senator Nunn made his analysis, he stated explicitly that he had not had access to the subsequent practices.

Would you say that those subsequent practices would be even more important in a context of a hodgepodge or sloppy or ambiguous negotiating record?

Mr. ROVINE. Yes, I would, Senator Specter. I think that was the point, that if there are ambiguities in the record, and there may be not be, but if there are then subsequent practice subsequently becomes very important in trying to determine what the proper meaning of any treaty is.

I think it is for that reason that subsequent practice is given a primary place in the Vienna Convention Law of Treaties and the negotiating record is given a subsidiary place.

It is like trying to lock yourself in on the original intent of the framers of the Constitution. Of course you look at what the original intent was and you look at the intention of the Founding Fathers, but if you stop there you are going to be in trouble. The further you get in time away from the original intent of the Founding Fathers, the more you have to look at subsequent practice.

That is certainly true with a constitutional document, a charter document such as the UN Charter. I think it is true of a bilateral treaty relationship as well if this is a living dynamic agreement that we have, and I think this one is.

Senator SPECTER. Mr. Meeker, you testified that Ambassador Nitze had changed his mind under coaching from Judge Sofaer. Do you have any record basis for asserting that Ambassador Nitze had ever expressed a contrary view to the one he is articulating now?

Mr. MEEKER. Judge Sofaer himself, when he was testifying before these committees on March 26, made that statement.

Senator SPECTER. That he had coached Ambassador Nitze?

Mr. MEEKER. No, that Ambassador Nitze had held the traditional interpretation up until that time, but in going over the treaty with Ambassador Nitze, Ambassador Nitze came to the conclusion which Judge Sofaer was coming to at that time.

Senator SPECTER. Do you have any evidence that Ambassador Nitze changed his view under coaching by Judge Sofaer?

Mr. MEEKER. The facts, I think, speak for themselves.

Senator SPECTER. Well, I am asking you about facts. Ambassador Nitze could have a view which would be unrelated to coaching by Judge Sofaer. Do you have any evidence that Judge Sofaer coached Ambassador Nitze?

The point that I am coming to is I would very much like to depersonalize it all. I would like to depersonalize Judge Sofaer. I would like to look at the record and subsequent practices. I would like to depersonalize Ambassador Nitze. I do not think it advances the cause any unless you have evidence that Ambassador Nitze was coached by Judge Sofaer, and if you do to support what you said, I am interested to hear it.

My question is do you have such evidence?

Mr. MEEKER. Ambassador Nitze had earlier taken the traditional interpretation as the correct one, and I think if you will consult the record of the hearing on March 26 you will see exactly what Judge Sofaer said about his conversations with Ambassador Nitze at that time, and I believe that record does speak for itself.

Senator SPECTER. So that is your only basis for the assertion of coaching?

Mr. MEEKER. I think the record speaks for itself.

Senator SPECTER. Well, then I am asking you a question. Is that record the only basis you have for your assertion of coaching?

Mr. MEEKER. Well, none of us was present at that meeting between those two gentlemen.

Senator SPECTER. That is why I wonder why you speak of that.

Mr. MEEKER. I am simply taking the statement of one of them; namely Judge Sofaer, as to what occurred when they spoke about this.

Senator SPECTER. Well, I do not think that Sofaer talks about coaching.

Thank you very much.

Chairman PELL. I will forgo my questions, because I'm very anxious to get to the second panel.

Senator Humphrey, do you have any questions?

Senator HUMPHREY. I will listen for awhile.

Chairman PELL. Thank you very much.

Senator McConnell.

Senator MCCONNELL. I just arrived, Mr. Chairman. Go right ahead.

Chairman PELL. Thank you very much.

Now we move on to the second panel. I thank Mr. Rovine, Mrs. Chayes, and Mr. Meeker very much for being here.

And we come to Mr. Sidney Graybeal, former ABM Treaty negotiator, and Mr. William Sims, former attorney adviser, Office of the State Department Legal Adviser.

Chairman BIDEN. Mr. Chairman, before they begin, I would like to make a point to Senator Specter. Did I hear him correctly in saying that there was no record of subsequent practice?

Senator SPECTER. There are many aspects of subsequent practice, where there are records in existence where they have not been made available to any Senators, including myself.

Chairman BIDEN. I think one good example of subsequent practice is the yearly ACDA report where, for years, the U.S. Government has stated that testing of space-based systems is prohibited under the treaty.

Senator SPECTER. Well, I'm familiar with those records. Those are some of the subsequent practices. But they are far from the total.

They really repeat what the agency thinks. And it is probative, and there is a shift in 1978 and 1977. But there are many subsequent practices, and there are records of them, specifically, the Standing Consultative Commission, which involved what the United States and the Soviet Union thought, acting together, as opposed to what one Federal agency, ACDA, recorded in its annual report.

Chairman BIDEN. Thank you.

Chairman PELL. Senator Biden.

Chairman BIDEN. Do any of you gentlemen have an opening statement you wish to make?

STATEMENT OF WILLIAM SIMS, FORMER ATTORNEY ADVISER, DEPARTMENT OF STATE

Mr. **Sims**. I have a prefatory comment. I am here at the request of the chairman. I am happy to respond to that request.

However, I'm knowledgeable of my duties to my former client, the executive branch. And as a result, I have secured their consent to testify this morning, and I have received reasonable guidance as to the scope of that testimony.

If I might characterize that guidance for the record, they have permitted me to testify as to the facts and substance of communications both oral and written while participating as a lawyer in the executive branch.

They have however reasonably asked me not to quote verbatim any written or oral communication I might have participated in.

STATEMENT OF SIDNEY N. GRAYBEAL, FORMER ABM TREATY NEGOTIATOR, CURRENT VICE PRESIDENT OF THE CENTER FOR STRATEGIC POLICY, SYSTEMS PLANNING CORP., ARLINGTON, VA

Mr. **Graybeal**. I had short informal remarks I would like to make before we start the questioning, if I may, Senator.

Chairman **Biden**. Surely.

Mr. **Graybeal**. Four points. I would like to say who I am and what my role was.

I am Sidney Graybeal. I worked at CIA 15 years, State Department Arms Control Agency for 12, back to CIA for 4, retired, currently working for System Planning Corp.

During my role in the arms control agency, I was the alternate executive officer on the SALT I negotiations, and in that capacity, participated in certain of the negotiations pertinent to the hearing this morning.

It's in that capacity that I am here. I am calling on my memory. I do have access to the classified negotiating record, but that record is classified, and I'm in no position to reveal any portions of that, or no authority to reveal any portions of that record.

So my remarks by necessity will be general in answer to your questions in terms of my memory.

Senator **Specter**. Mr. Graybeal, you say you do have access to that record?

Mr. **Graybeal**. Yes, sir.

Senator **Specter**. How do you have access to it?

Mr. **Graybeal**. Our company has a contract with the Department of Defense, has had since 1972, which involves implementing of the SALT I agreements. I am responsible for that contract.

Under that contract, we are asked a series of questions by the Defense Department, and asked to come up with information to assist them in performing their job.

In this capacity we have a contract with the DOD, with the DDR&E, and in that capacity, we have been asked many questions pertaining to the implementation of treaties, specifically the ABM Treaty.

Questions such as: Do we have a dual standard? Are we tying our hands tighter than we're tying the Soviets' hands?

And in some cases, which I can't go into because of the classified nature, reviewing the actual records, suggesting that perhaps we are being more strict on ourselves.

Those are very legitimate questions, they should be asked. They are important. One of those questions was asked in late in 1984, specifically, are we tying our hands tighter than we're tying the Soviets' hands on this question of future systems?

In that capacity, we prepared a report which was submitted to the Department of Defense which provided a summary of the negotiating record pertaining to that subject.

That report does not contain conclusions. But in preparing that report, we had to have access to the negotiating record.

I do not have the negotiating record in my office. And we go to the Pentagon or the State Department to get access.

Senator **Specter**. Thank you.

Chairman **Biden**. Mr. Graybeal, is that the same report that is referred to as the Fitzgerald/Graybeal report?

Mr. **Graybeal**. That's correct. That's one of several reports that we prepared. That was prepared before this issue became a very prominent issue, and that report, I gather, has been distributed by the Defense Department.

Chairman **Biden**. That report, I say to my colleagues, is in S. 407. And that report was compiled on the basis of your access to the negotiating record?

Mr. **Graybeal**. We had access to the negotiating record in preparing that report. But it was prepared before this issue came up, and it was prepared to answer one of several questions. Are we tying our hands tighter than we're tying the Soviets' hands in terms of limitations on future systems?

Chairman **Biden**. Let me begin my questioning with Mr. Sims. Did you work in the office of the State Department Legal Adviser during the time the "reinterpretation" of the ABM Treaty was emerging in this administration?

Mr. **Sims**. I did. I joined the State Department's legal adviser's office in August 1985. I worked in that office from August until January of the following year.

At that time I departed the legal adviser's office and joined the Arms Control and Disarmament Agency's general counsel's office. I stayed there through August 1986.

Chairman **Biden**. Why did the responsibility to assist the State Department Legal Adviser in the "reinterpretation" effort fall to you rather than to one of the attorney's more experienced with arms control matters?

Arms control matters were not at that time your expertise, were they?

Mr. **Sims**. Well, I had expertise in terms of being in the military some 13 years, of having worked in intelligence in the military, and in terms of retaining my access to classified and code word information.

I also had legal training. I arrived in the legal adviser's office and was immediately given the arms control portfolio. Why, I don't know.

In assisting the legal adviser, in formulating his reinterpretation, I was the primary officer charged with going into the negotiating records.

Unfortunately, those more knowledgeable than I and more experienced in arms control, men and women who had been involved in the process since the early 1970's, were ignored. Their views were not solicited.

Chairman Biden. Who were the attorneys primarily responsible for helping the Legal Adviser when he undertook the reinterpretation of the ABM Treaty?

Mr. Sims. Primarily two, initially, and then a third was added. I was one; the other two gentlemen had come with the legal adviser when he arrived at the State Department. I think during the early summer.

None of the individuals directly involved were career civil servants—the career attorneys who had the knowledge and experience.

Chairman Biden. What role did the other agencies—specifically, DOD general counsel, ACDA general counsel, and the Office of the Secretary of Defense—play in providing the Legal Adviser's office evidence concerning the interpretation of the ABM Treaty?

Are they the people you are referring to who were left out of the——

Mr. Sims. No, sir, there were two different levels. One level was intraoffice, within the legal adviser's office, and the other level was interagency, across the spectrum of the executive branch.

As I walk down the list, I've already discussed the players within the legal adviser's office.

The players, interagency? Well, OSD seemed to be—admittedly, my persepctive is from a very low level; I was a low staff attorney in this process—but I would receive the communications flowing in from the other agencies, and then funnel them to the legal adviser.

OSD seemed to be in the driver's seat. They offered the initial memo, late September 1985, and then we all had to clamor to try to catch up.

I know that in DOD's general counsel's office, a Mr. Jack McNeill authored a memo critical of the new interpretation. I know that the ACDA's general counsel's office also authored memorandums critical of the new interpretation.

Unfortunately, the two spokespersons who were drafting memorandums and getting information to the legal adviser were two attorneys recently hired by the Government, one in OSD and myself.

Chairman Biden. OSD is Office of Secretary of Defense. That's Richard Perle?

Mr. Sims. He was involved in the process. Neither of us had experience—I had limited experience in international law, and I assume the other gentleman had limited experience as well.

The upshot was that the experts were left out of the process, and as a result, I feel that the procedure was flawed, resulting in conclusions that were inaccurate.

Chairman Biden. What conclusion did you draw from your reading of the negotiating record as well as other documents about the "reinterpretation".

Mr. Sims. I suppose I would have to disagree with Secretary Chayes. I will admit that the ABM negotiating record, as it existed in the fall of 1985, was fairly hard to locate.

I do not suggest, however, that the process of negotiation that occurred in the fall of 1971 and the spring of 1972 was a "hodgepodge". I am honored to be sitting next to Mr. Graybeal. Having read many of the memcons that he authored during the negotiation process, and I commend the Fitzgerald-Graybeal study to all the Senators of the U.S. Senate.

If you go through that document you will see that our negotiators were true professionals. They methodically accomplished each and everyone of their instructions.

And I say methodically, because timing is the key to understand properly the ABM Treaty and its interpretation. You have to recognize what our negotiators were doing and when.

And again, the negotiating record is classified, but I can tell you to track developments in the record by following this chronology.

First, concessions were gained in article V. Then the negotiators moved on to article II. They moved on then to Agreed Statement D, and finally, article III.

You can only understand the ABM Treaty if you understand what concessions were gained, and how those concessions impacted on other aspects of the treaty.

When you look at the treaty in that light, you can see that the text of the treaty and the negotiating record, in conjunction with the subsequent interpretation provide a document that I think is compelling, compelling in its support of the narrow interpretation.

Chairman Biden. I have other questions, but that's a pretty compelling statement you just made.

Let me shift if I can to Mr. Graybeal. Arguing for the broad intepretation of the ABM Treaty, Ambassador Nitze and other administration officials have made much out of the apparent Soviet unwillingness, expressed during the negotiations, to regulate the unknown.

But isn't it true that President Nixon's instructions to our negotiating delegation specifically prohibited our side from discussing with the Soviets any examples of future ABM systems, and that the reason was fear of inadvertently or indirectly disclosing information about research programs we had underway?

Mr. Graybeal. That's essentially consistent with my memory, sir.

Chairman Biden. And is it not likely that many of the Soviet comments about the unknowability of the future were designed as a fishing expedition to learn more about American defense programs, or am I reaching too far?

Mr. Graybeal. I think you are correct. The instructions were clear in terms of the U.S. desire to obtain limits on future systems, other than fixed land-based systems on which the United States did have a sensitive program.

The instructions did prohibit the delegation from providing any information on what we had in mind when we said, "future systems", until later after the agreement on Article V, when Secretary Brown, who was a member of the delegation, was permitted to make a statement which identified lasers as an example of what the United States had in mind.

Chairman **Biden**. Now after that point——

Mr. **Graybeal**. Therefore, many of the statements that were made by the Soviets, and questions, between the agreement in the working group to the content of article V were, in my view, fishing expeditions attempting to find out what the United States had in mind.

And they're also directly related to the question of deployment, because if you prohibit development of mobile systems, there still was a question, if a fixed land-based system based on future systems were developed in the future, are you going to allow 100 of those around Moscow?

And so we still had open the question of deployment in the context of article III, and that was the purpose of Agreed Statement D.

Chairman **Biden**. That seems to me to be a fairly important point, and one consistent with what Mr. Sims has just said, that it's important to understand the chronology and the objectives and the limitations that were imposed upon our negotiators by the President.

The conclusion I draw is that whatever ambiguity might exist in the negotiating record could only have been expected, and it no way affects the Soviet decision to finally agree to the ABM Treaty.

It seems to me that those instances where the Soviets kept picking at the issue of future systems are explained in large part by the knowledge that the President of the United States expressly told our negotiators that they were not at liberty to discuss any of these things.

It seems to me it's a consistent Soviet tactic that where they have little knowledge, they probe and probe and probe.

Do you think I am overstating that?

Mr. **Graybeal**. I think you may be overstating slightly, sir, in the sense that the negotiating record, as has been pointed out previously, is a record of what the United States felt transpired.

That record is reflected both in plenary statements, miniplenary statements, and memcons reflecting the results of working groups.

Much of the substantive discussion that referred to article V took place in a working group chaired by Graybeal on the United States side and Karpov on the Soviet side. Those discussions would take 2 to 3 hours, and they were recorded in the form of a memcon which summarized the results of those meetings.

Therefore, there is no verbatim of what Graybeal said or what Karpov said in that exercise. So you're relying on reports that are made verbally, various memcons, and the unbracketed text for the results of those meetings.

So in that context, you can have ambiguities, because the key issue that people argue about is not whether the U.S. delegation understood their instructions; they did. They implemented them very carefully.

They believed they had implemented them, and did have Soviet agreement.

The problem is, did the Soviets in fact agree to the limits on future systems? And much of that discussion took place in a working group responsible for article V where there is really no verbatim record of what transpired.

Chairman **Biden**. But there's no doubt in your mind that the American delegation intended to limit future systems?

Mr. **Graybeal**. None whatsoever. That was our instruction. If we hadn't implemented them, we shouldn't have come home. We felt we had implemented them.

I believe Ambassador Nitze so indicated that we thought we had implemented our instructions. The controversial issue is whether the Soviets did in fact agree to those limitations.

Chairman **Biden**. That is one issue raised by some, but the central issue is, what did we want to do?

And President Nixon's instruction to the delegation was to get Soviet agreement to prohibit the development, testing, and deployment of space-based and other mobile ABM systems and components, regardless of the technologies upon which they were based.

Is that not correct?

Mr. **Graybeal**. That's absolutely correct. I don't think you will find anyone either arguing for the broad interpretation or the narrow interpretation who would dispute the points that the instructions were clear, and that the delegation thought they implemented the instructions.

They came home and reported they had implemented them. And that was the basis for the ratification process.

Chairman **Biden**. Thank you. I appreciate your letting me go over it.

Senator **Specter**. Mr. Graybeal, you say you have no doubt what was in the minds of the U.S. negotiators. You were one of them.

But the controversial issue, as you've just testified, is whether the Soviets agreed.

Are you in a position to assure these two committees that you can read the mind of the Soviets as to what was in their minds?

Mr. **Graybeal**. I have no ability to be a mind reader, sir. I only can go on precisely the exchanges that took place between the Soviets negotiators and the United States negotiators, what language we used, what words we used, what description we used, what their responses were.

And that's basically the process by which the negotiation takes place.

Senator **Specter**. So you can testify with assurance, as you already have, as to what was in your mind, but you can't testify with assurance as to what was in the Soviet mind?

Mr. **Graybeal**. I cannot testify with assurance what was in the Soviet mind. I can only testify that during these exchanges, from the statements that the United States made and the Soviet response, that in my view the Soviets did understand that we were limiting future systems; and they did agree that article V did provide such limitations.

But that agreement is in the working group, Karpov-Graybeal working group, and not in a plenary meeting. And the details of what Graybeal said are nowhere in any record that you can find, because as I say, it was a lengthy two-way conversation across the table.

There is no statement of all the things that Karpov said in the negotiating record. So you do not have a solid basis for what the United States described in terms of future systems, because we could not be specific, as the Senator has pointed out.

So we had to talk in future sciences, likely engineering advances, things will happen in the future. The ABM Treaty is an indefinite agreement. Language of that nature, sir.

But this was all in the exchanges at the working group level. You must understand the negotiating process.

The delegations——

Senator SPECTER. Are you saying that the plenary session was really the dispositive group as opposed to the working session?

Mr. GRAYBEAL. There were three levels taking place during the SALT I negotiations. There are plenary meetings which were formal statements, where we had an exchange with the Soviets. There may or may not be discussions following those plenary statements that were also recorded by the interpreters.

There were many plenary statements where less than the full group would make statements, which may or may not be handed across the table to the Soviets.

These delegations worked ad referendum to the governments. The mini-plenaries worked ad referendum to delegations.

Then we established working groups. Ambassador Smith and the delegates had working groups who were assigned responsibility for specific articles.

They established a working group chaired by Graybeal on the United States side, Karpov on the Soviet which had representatives from each of the components, OSD, JCS. We were assigned responsibility for negotiating article II and article V, and working out the details which were reported back to the delegates both in the form of memcons, my verbal presentation, and bracketed and unbracketed texts.

Excuse me.

Senator SPECTER. You are saying that what the working group did, you for the United States and Ambassador Karpov for the Soviet Union, was then subject to further activities by the plenary group?

Mr. GRAYBEAL. The results were reported back to the United States side by our working group to our delegates and to the senior group. There is no plenary statement on the record that I am aware of which explicitly takes the agreement and says this has been agreed to, article 5 has these words, article 5 explicitly means that it bars all present and future systems. Such a statement does not exist.

Senator SPECTER. So to the extent that there is no explicit statement to that effect, some question still can exist?

Mr. GRAYBEAL. I think in my personal view there can be legitimate questions of ambiguity in the negotiating record. I have great respect for Ambassador Nitze. I think he looked at this very rigorously and I think he has a basis for certain ambiguities in the negotiating record which can raise questions as to whether or not the Soviets did in fact agree.

In his speech on April 1, I think he sets that forth very clearly, and he carefully chooses his words carefully in that speech, that you cannot from the negotiating record tie down that the Soviets explicitly agreed to this particular point.

Senator SPECTER. Legitimate consideration as to these ambiguities.

All right, let me move to Mr. Sims for just a minute, because there is not a whole lot of time here. Mr. Sims, you testified about, your words were the concessions in Article 5. And you testified that you reviewed the negotiating record.

But is it not true that the United States proposal on article V contained a provision which was tabled which would have explicitly limited a futuristic agreement and that was stricken by the Soviets? It was stricken by the parties because the Soviets were unwilling to make that kind of an express limitation?

Mr. SIMS. Sir, it is true that there was a provision in article V that would have had that operative effect. I think, however, given the classification of the negotiating record—and I share your concerns regarding your initial statement—that this kind of dialog can best be accomplished in closed session.

But given the constraints that we cannot divulge classified information here, I will try to steer you in a direction so that you can come to a proper understanding.

Chairman BIDEN. If I may interrupt, why don't we go into closed session and clear the room? We will go in the back room.

Senator SPECTER. Fine. Let me ask a couple more questions.

Mr. SIMS. The question you have asked strikes right at the heart of understanding the ABM Treaty.

Senator SPECTER. You testified about concessions, in your language, which the U.S. team obtained. But it was not a concession, was it, when the proposed section 3, which would have made it plain that futuristic systems were included, was in fact deleted from the ABM Treaty? Paragraph 3 of article V.

Mr. SIMS. The key series of discussions occurred on December 20 and 21, 1971. Those are the most important series of conversations that occurred in the entire ABM Treaty negotiating process. They occurred between Dr. Garthoff and Mr. Grenefski, a member of the Soviet delegation.

You ask a good question, but to understand why we secured our concession, you have to look to see what happened to 5-3. Where did it go? It became Agreed Statement D. You also have to look to see how the negotiators inserted currently.

If you read Dr. Garthoff and Mr. Grenefski's conversation, you would be eminently impressed with our negotiator's ability to take the Soviet position and immediately turn it on them to our advantage. And significantly, one of the key memcons, specifically one of the conversations that relates to this series of conversations, was not contained in the memorandum provided the U.S. Senate by the State Department's legal adviser.

Senator SPECTER. And why was that? That is a big issue which is worthy of a public exposition, that supposedly the documents submitted to the executive branch were much more assertive of the so-called narrow interpretation, but the executive branch deleted those materials when they were before the Senate for the ratification procedure.

That is essentially what you are saying.

Mr. **Sims**. I am not familiar with that series of events, sir. But I do not mean to imply that——

Chairman **Biden**. I thought you were referring to the deletion of the negotiating record when it was sent up to the Senate.

Mr. **Sims**. In 1986.

Chairman **Biden**. He is referring to 1986. In other words, the record we have.

Senator **Specter**. You were not referring to the deletions by the executive branch in 1972?

Mr. **Sims**. No, sir. But I should not imply that the document was concealed. The document was forwarded to you. It is in the large stack of documents currently retained in S. 407. It, however, is not referenced in the discussion of the December 20 and 21 conversation concerning the insertion of the word "currently."

Senator **Specter**. Just to clarify the record, it is my understanding that the Senate did not get the full record in 1972. Some of it was withheld at that time. Those are some records which I have requested, and I think the Senate ought to have it at the present time.

But you are referring to some other records you say which were not part of the negotiating record submitted in S-407?

Mr. **Sims**. They are submitted and they are in S-407. I am only saying that the memorandum dated August 6, 1986, does not contain that citation that I am referring to.

Senator **Specter**. Which memo are you referring to? Judge Sofaer's memo?

Mr. **Sims**. The legal adviser's office, yes, the August 6th memo.

Senator **Specter**. Mr. Sims, how did your view of this matter come to the attention of these Committees?

Mr. **Sims**. Sir, when I grappled with these issues and with my role in this process, as I observed the process rolling on in the fall of 1985 through the summer of 1986, I had strong reservations about what we were doing. I had reservations about the procedure. I had reservations about the conclusions reached.

As a result, I did the only thing I felt an honorable lawyer could do. I ensured that my reservations were brought to the attention of the highest offices to which I had access. I documented my reservations in a memorandum for the file, and then I departed the Government quietly.

Senator **Specter**. My question was how did your views come to the attention of these Committees?

Mr. **Sims**. Sir, I do not know that. I do not know that. I can tell you that as I have been practicing law in the state of Arizona, in late January, early February, in the span of one day I had four reporters call me with the specifics of my memo and asking my views.

Senator **Specter**. And then you were contacted by staff of these Committees?

Mr. **Sims**. I was, sir.

Senator **Specter**. You say that your appearance here today was approved by the executive branch?

Mr. **Sims**. It was, Senator.

Senator **Specter**. I take it that it was approved by Judge Sofaer as part of the executive branch?

Mr. **Sims**. We sent a letter to my most recent former employer, Mr. Tom Graham, and as I recall the response we got back was an approval that was cleared through the legal adviser's office.

Senator **Specter**. Approved by the legal adviser's office, which is Judge Sofaer's office?

Mr. **Sims**. I do not recall the specifics. A member of my firm is in the audience and he handled that for me.

After the reporters started calling me, I realized that I could do the best thing that a client should do: I got a very good attorney, and I could tell everyone: Talk to my attorney.

Senator **Specter**. Well, I think we have probably heard from enough attorneys today. Let us go into closed session.

Chairman **Biden**. Well, there are some more questions in open session. Let us stay in open session a little longer.

Chairman **Pell**. Fine. Very good idea.

Mr. Graybeal, I was very interested that your company has access to the negotiating document. How many members of your company have access to that document?

Mr. **Graybeal**. Three professional members of the company, one of whom was working with us in a consulting capacity, Col. Charles Fitzgerald, who has since died of cancer. So he is no longer with us.

So there are two members of our company that have access at the present time. But that access—and the records reside in the Pentagon or in the Government. I only had limited amounts of that negotiating record in the company, and that is in a room specially approved by and under the control of the Defense Department.

And those are memcons contained in reports which we prepared. In other words, reports we prepared do contain annexes with the memcons.

Chairman **Pell**. All of you are obviously cleared for classified material. Do you have secretaries who are employed, too, who had access to this material?

Mr. **Graybeal**. We have secretaries who type our reports, but they type the report—that is usually written up by Colonel Fitzgerald or myself, based on the record. And then if we attach memcons to that report, the secretary will attach the memcon. So she has access to it in that capacity.

Chairman **Pell**. And to work from the report, where was the report when you prepared your report? Where was the negotiating record?

Mr. **Graybeal**. The negotiating record that we used in preparation of this report resided primarily in the Department of Defense. Colonel Fitzgerald would go over and work on that record, because he had been a member of the SALT I delegation, specifically one of Ambassador Nitze's advisors during SALT I, and then was a member of the Defense Department until he retired.

And if we could not find the records there, then we frequently would go to another part of the government, such as the Arms Control Agency, where they have a very complete record.

It is difficult sometimes to find all of these memcons, sir. There is no one place that I found that everything exists.

Chairman **Pell**. It is quite forbidding, the whole pile of documents.

In your judgment, do any of the relevant portions of the negotiating record that you reviewed really affect Victor Karpoffs' confirmation that article V's prohibitions apply to all types of ABM systems and components, regardless of the technology on which they were based?

Mr. GRAYBEAL. I think we are getting into details that are classified.

In terms of your question, Karpov was chairman of a group who did agree that the Article V did limit future systems. But as I say, the basis on what he agreed to gets into what was actually discussed in that exercise.

Chairman PELL. Well, maybe we can touch on that as we go into a closed session.

Mr. Sims, according to the press reports you made the State Department legal adviser aware of the key exchanges between our two countries negotiating, the Soviet Union and us, that demonstrated that the Soviet Union regarded itself bound by the narrow interpretation, the traditional interpretation

That would be a correct statement, would it not?

Mr. SIMS. As I recall the press reports, they are inaccurate. I had nothing to do with looking at negotiations that occurred in the Standing Consultative Commission. You must recognize that we had to do this in a span of about three weeks.

I had to go through the records in about 2 weeks. I had to make a value judgment as to which records I could go through. I went through the negotiating records for SALT I and SALT II. Recognizing that the SCC delegation has a very adequate record, I was hoping that if they had anything in that record they would bring it to our attention.

I focused on those records that were less well indexed, SALT I and SALT II. So I did not bring any SCC, Standing Consultative Commission, reports to the attention of the legal adviser.

Chairman PELL. Thank you. I have no further questions.

Chairman BIDEN. I would like to ask some more questions, if I may, in a second round if that is possible in the open session.

Mr. Sims, I want to clarify a point that you made that I thought was an important point, but apparently Senator Specter and I each got a different understanding. When you suggested that there was a portion of the total record that was not referenced, you were referring to Judge Sofaer's report justifying the broad interpretation of the ABM treaty, and that that particular record which was not referenced was damaging to that interpretation.

Is that correct? Or would you restate it in your own words?

Mr. SIMS. The actual memcon I think is referenced in the document, in the memo. The actual memcon is provided to the U.S. Senate. I know of no instance that the legal adviser to the State Department withheld documents from the ABM Treaty negotiating record from the Senate. You have it all.

Chairman BIDEN. What is the point you are making?

Mr. SIMS. The point I was making is--and it really strikes to the role of an attorney as being counsel versus advocate—the August 6 memorandum is an advocacy piece. It argues a very strong position for a client.

Chairman **Biden**. And that memo does not make use of the memcon you are referring to?

Mr. **Sims**. It makes use of the memcon. It cites portions of it. It just leaves out one significant statement.

Chairman **Biden**. And the point it leaves out is damaging to the argument from your perspective?

Mr. **Sims**. Yes, sir, from my perspective. But I do not have a monopoly on wisdom. I was the youngest attorney in the office. I might be wrong. But I felt strongly enough about it that I felt I had to leave the Government.

Senator **Specter**. I did not hear that last answer. You felt strongly enough about it so that?

Mr. **Sims**. I left the Government, sir.

Senator **Specter**. Are you suggesting bad faith by Judge Sofaer in leaving it out?

Mr. **Sims**. Sir, I think that is perhaps too strong. What I am suggesting is that we all have a constitutional responsibility, you and I. We take oaths as officers of this Government to defend the Constitution. The Constitution contains a very powerful responsibility assigned to the President, to take care that the laws are faithfully executed.

The ABM Treaty is the supreme law of this land. It was my fear, it was my reservation, that the process that we followed was not sufficient, so that we did not allow our President an objective assessment of the ABM Treaty. We provided him what I think was a flawed decision memorandum.

By the administration's own admission, they have yet to undertake an exhaustive exploration of subsequent practice. And from the witnesses that testified in the first panel, we were told that subsequent practice is a key ingredient in trying to find out what a treaty means.

I had reservations that we as Government attorneys—after all, the Government is not like the private sector. I have only been practicing for 6 months in the private sector, but in the private sector I have opposing counsel and I have a judge and we have discovery. And as a consequence, all the issues are ventilated and a decision rendered.

Well, in the Government there is no opposing counsel, there is no judge, and discovery, as you are finding out, is quite limited because the records are classified.

Senator **Specter**. There is oversight by the Congress.

Mr. **Sims**. There certainly is, sir, and that is what we are doing here today.

Senator **Specter**. You bet.

Chairman **Biden**. Not only is there oversight by the Congress, but the Congress usually expects the administration, any administration, to be objective in their——

Mr. **Sims**. Senator Specter's comment earlier on concerning personalities—one thing also that I have learned in the practice of law, in the private practice of law, is that I can accomplish my client's bidding best by keeping things impersonal.

My comments today are strictly related to the process. I am making no comment as to the individuals involved. In fact, Judge Sofaer is the hardest working man I have ever worked for.

Chairman **Biden**. I have no objection to that. I think he is a hard working fellow, too. I was not referring to him specifically. I am talking about the process. You expect an objective process. We should expect an objective process. That is the point I am trying to make.

Let me ask you, the references of this particular memcon related to article V. You negotiated that, Mr. Graybeal. Tell us about article V. What was meant? What was intended by our negotiators and what did our negotiators think they achieved when you finally nailed down article V?

Mr. **Graybeal**. Article V, the purpose of article V is essentially to get—to implement U.S. instructions to limit future systems. It does not stand on its own. It is related to article II, article III, and other articles of the treaty. But the main purpose of that article is to get limits on future systems, development and testing of such systems.

During the process of negotiating that, because of points you made earlier and I repeated, that we were not allowed to go into specifics, we had to talk about the likely advances of science and the future in general terms. And in my view, the Soviet side fully understood the scope and nature of what we were trying to accomplish.

And I think the unbracketed text which was reported back to the delegation essentially accomplished that purpose in the present wording of the language.

It is true, during that negotiating process a lot of different words were tried by both sides in order to obtain the objectives of that article. And some have been referred to here. Others exist, but they are in the classified record and I can not go into the details.

Chairman **Biden**. Had you been at liberty in terms of the instructions from the President of the United States of America at the time, had you been at liberty to discuss future systems with the Soviets as they probed you, as they probed the delegation, and you had been able to say, this is what we mean, A, B, C, D, E, and you had been able to do that, what do you think the impact would have been in terms of the way in which the treaty was written?

Mr. **Graybeal**. I think that would have greatly facilitated the very lengthy exchanges we had talking around the subject. It would have minimized the amount of exploration and probing the Soviets did to find out what programs the United States had in mind that we were trying to protect at the time.

However, it is a "what-if" question, and I remind you that the technology in 1971 and 1972 is quite different than the technology today. And we would be hard pressed to have even invented some of the things being considered today. They were not even in our field of view at the time.

In this context, may I make one other point? I want to endorse something Senator Specter said earlier. I think he made a very key point. The negotiating record is important in trying to clarify what the treaty interpretation is. But this is only one point.

The technology has moved so fast that, if you believe in the ABM Treaty and believe in the SDI Program, as I do, you must start a process of getting at what is meant by "component" in the context of these other physical principles.

You must get at the context of elements. You must get down and get an agreement with the Soviets as to what is a component or a subcomponent of an element in the context of the ABM Treaty. And that can only be done in negotiating with the Soviets.

We must——

Chairman **Biden**. Is that not why we have the Standing Consultative Commission?

Mr. **Graybeal**. The Standing Consultative Commission is essentially an implementing body for the agreement. It is focused primarily implementation, and this would fall within the purview of the Standing Consultative Commission. But it could be accomplished in any form and would require some very advanced technical expertise to do the type of work that I think is essential.

These types of agreements, what can and cannot be done in the context of the treaty, would facilitate getting the information on the SDI research Program necessary for the President to make a decision.

Chairman **Biden**. I would like to make the point, too, that Senator Nunn argues, that in fact much that the administration contemplates doing under the treaty, at least in the near future, would be able to be done in the narrow interpretation. By the way, whether or not he is correct remains to be seen.

Let me ask Mr. Sims a question. According to press reports, you made the Legal Adviser aware of key exchanges between the United States and Soviet arms control negotiators which had the effect of demonstrating that the Soviets in the period since the ABM Treaty ratification have regarded themselves as bound by the traditional interpretation.

Among these was a 1976 exchange in the SALT II negotiations demonstrating that the Soviets understood that article II of the ABM Treaty applied to all types of ABM systems and components, including those based on future technologies.

Another was, in the spring of 1985 in an exchange in the Standing Consultative Commission.

Now, what weight did you attach to these exchanges, did you attach to these exchanges?

Mr. **Sims**. I attached great weight to the exchange during SALT II. As I commented earlier to Chairman Pell, I had nothing to do with the Standing Consultative Commission reports, and so I did not provide those to the legal advisor. I did, however——

Chairman **Biden**. You did, though, as it related SALT II?

Mr. **Sims**. Yes, sir, I did.

Chairman **Biden**. Were the exchanges related to SALT II included in written analysis on which the administration's reinterpretation was based?

Mr. **Sims**. It is difficult to say. That memorandum is classified, so I do not think I can comment, the verbatim comments out of the SALT II record were not contained in the August 1986, memorandum authored by the legal advisor.

Chairman **Biden**. I have about 10 more minutes of questions. Before I yield, let me ask a question for the record.

Are you an Air Force Academy graduate?

Mr. **Sims**. I am, sir.

Chairman **Biden**. Are you a Rhodes Scholar?

Mr. SIMS. Yes, sir.

Chairman BIDEN. And you are presently a practicing attorney. Is that right?

Mr. SIMS. I am, sir.

Senator SPECTER. Mr. Graybeal, I thought I noticed you straining at the leash just a little bit when Senator Biden was finishing up a comment before turning to Mr. Sims. Senator Biden referred to Senator Nunn's interpretation and had asserted that everything President Reagan wanted to get done at least currently could be done under the narrow interpretation. Do you agree with that?

Mr. GRAYBEAL. I am not sure I am in a position to answer that question because I am not technically competent to know certain of the experiments that are called for in the SDI Program. I think this is something more appropriate for General Abrahamson to address because you have a question here of whether or not you can do the necessary experiments to provide the President with adequate information to make an intelligent decision whether or not to proceed with deployment and the question is, can those experiments be conducted under the narrow interpretation or do we have to move to the broad interpretation, and though I work on some small parts of this problem I certainly do not work on the total picture and I would not consider myself qualified to answer that question.

Senator SPECTER. So what I hear you saying is it may be necessary to go to the broad interpretation. You just do not know for sure.

Mr. GRAYBEAL. I do not know because I have not seen the specific experiments and the timing of those experiments, but I certainly reinforce a comment made earlier by Senator Biden. I think the ABM Treaty was useful, has been and is useful to the United States. However, if the ABM Treaty is standing in the way of accomplishing what is necessary to U.S. security, then we should face that issue directly and implement the withdrawal provisions of the agreement, withdraw or abrogate, but I do have trouble when we change history in order to be consistent with what we want to do.

Chairman BIDEN. If the Senator would yield for just a second——

Senator SPECTER. Let me ask just one question. Do you think the ABM Treaty is unduly restricting the United States now on carrying out activities which are vital for the well-being of the country?

Mr. GRAYBEAL. At the present time I am unaware of any specific experiments that the ABM Treaty is restricting, but I am a novice in this field, and that is a question which my understanding is that the executive branch is currently addressing, and I think that is part of the reports that they are planning to complete by the end of April, so I would certainly not profess to second guess the administration when I have such a narrow view of the world.

Chairman BIDEN. The only point I wish to make since I invoked Senator Nunn's name, I was not suggesting that I am positive he is right or wrong. A second point is that the only potential experiment that any of us know of that would in fact violate the narrow interpretation of the treaty would also be an experiment that would violate the broad interpretation of the treaty, and that is the kinetic kill weapon.

Senator **Specter**. Well, my understanding from Lieutenant General Abrahamson is that they would be approaching the experiments much differently under the broad interpretation, and that, in one simplistic definition, they would have eyes and brains instead of just eyes, and that it would be substantially cheaper in one specific by $250 million to operate under the broad interpretation. There are significant constraints, but we will have to call General Abrahamson for that.

Do not charge his question and answer to my time, Mr. Chairman.

Mr. Graybeal, coming back to the question as to—picking up on what Senator Biden has asked you about article V and what we accomplished, I do not quite understand your conclusions in light of the fact that you say article V was our effort to eliminate future testing in outer space. We have a specific provision of article V, subparagraph 3, to accomplish that, which is what we proposed, and it was eliminated. Are you saying that we got about the same thing in Agreed Statement D?

Mr. **Graybeal**. No, sir, I am saying that article V as it currently exists in the treaty in my view does limit future systems. The third paragraph was pulled out of article V and essentially became the basis for Agreed Statement D later. Precisely when and why it was pulled out is in the classified record, and I do not even have a memory of it right now.

Senator **Specter**. Well, would it change your view if classified records show that it was pulled out because the Soviets said they did not want to deal with future experimentation and we finally agreed to that?

Mr. **Graybeal**. That is one possibility, but there are other possibilities. That would not change my view.

Senator **Specter**. If that possibility were factual, would that change your testimony?

Mr. **Graybeal**. No, sir.

Senator **Specter**. Why not?

Mr. **Graybeal**. Because the discussions that took place in the Graybeal-Karpov working group in coming up with the language that currently exists in the agreement were very explicit and very detailed to the extent we could do that within the scope of our instructions, and there is no question in my mind that Karpov understood, and when he said he agreed with our views that agreement is reflected in the current article V. So that, pulling that item out would not change my views.

Senator **Specter**. As I read article V, which I have before me, and it has two paragraphs, paragraph 1, "Each party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based."

Subparagraph 2, "Each party undertakes not to develop, test, or deploy ABM launchers for launching more than one ABM interceptor missile at a time from each launcher, not to modify deployed launchers to provide them with such capability, not to develop, test, or deploy automatic or semiautomatic or other similar systems for rapid reload of ABM launchers."

And then a third paragraph, which was to provide that the parties would not undertake to deploy or giving classifications to others to perform the functions of those components with the proposed article III being to cover futuristic systems. Then article III is stricken. Now, how does article V with only paragraph 1 of 2 accomplish the purpose that article III was designed to do?

Mr. GRAYBEAL. Article V, paragraph 1 and 2, deal with the development and testing of ABM systems. The paragraph that you read, if I understood it correctly, dealt with deployment. Deployment was of concern, and deployment is dealt with in Agreed Statement D. As I say, when it was pulled out it essentially became a part of Agreed Statement D later.

Senator SPECTER. Mr. Graybeal, you testified that when Ambassador Nitze had provided his testimony that you agreed—I do not want to use the word "conceded"—you agreed that there was sufficient ambiguity for Ambassador Nitze's conclusions that the U.S. negotiators sought to limit futuristic testing but had in fact not done so.

Mr. GRAYBEAL. I agree that there is a basis in the negotiating record for an ambiguity which I think permits an honest person to read that record thoroughly in detail to come to the conclusion that we did not really nail the Soviets down in a firm plenary statement that we could hold them binding to in the future, and that is why I say Ambassador Nitze's statement of April 1 is very carefully worded. I have known him since 1969, and I have great respect for him. He is a very rigorous analyst. He digs into things in great detail, and he does not let go of them until he has fully understood them. He is a personal friend. I respect him, and I would like to keep this hearing—and the point was made earlier—depersonalized, so my comments reflect my conclusions based on my knowledge of what transpired, my personal negotiations with Karpov, and I have talked with Paul about this many times. He fully understands my views, and I think I understand his.

Senator SPECTER. OK, so as you have just articulated it, there is sufficient ambiguity in the negotiating record so that a man of good faith could say that the broad interpretation is the valid interpretation.

Mr. GRAYBEAL. That is correct.

Senator SPECTER. Thank you.

Chairman BIDEN. I would like to ask you a few more questions, if I may. Mr. Graybeal, some of this may be slight repetition. I do not think so, though. Have you read Judge Sofaer's August 1986 memorandum which has been provided to the Senate as part of the so-called negotiating record?

Mr. GRAYBEAL. No, sir.

Chairman BIDEN. Mr. Sims, have you read it?

Mr. SIMS. I have, sir.

Chairman BIDEN. Mr. Sims, you agree with the conclusions in the memorandum?

Mr. SIMS. Sir, I do not.

Chairman BIDEN. If your conclusions differ from the conclusions reached by the Legal Adviser's memorandum of August 1986, did you do anything to correct what you perceived to be an incorrect legal analysis?

Mr. SIMS. Throughout my tenure in the legal advisor's office, my responsibility was to review the memorandums that he drafted, that he and the other lawyers involved in the project drafted. I would write notes in margin when I though there were inaccuracies. After I left the legal advisor's office I went to the general counsel's office of ACDA. My responsibilities there were primarily dealing with the ABM Treaty reinterpretation.

One of those responsibilities included compiling about a seven-volume set of all documents relating to this issue plus an index, an annotated index describing each of those documents. Down in that office we, at the behest of Ambassador Nitze's office, did our best to ensure that the legal advisors' memorandums were accurate, and during the spring of 1986, as the legal advisor would draft his memorandums, Ambassador Nitze's office would circulate them through our office, and we would do our best to try to make sure that they were accurate.

Chairman BIDEN. Do you believe that the process, and we are speaking of the process now, not individuals, but the process, that you observed in the matter of the so-called "reinterpretation" within the Government when you were there, do you believe that that process lived up to the high standards of integrity and respect for the rule of law that you were trained to uphold?

Mr. SIMS. The latter portion of your question troubles me, to ascribe lack of integrity and high standards. I can describe the process, however.

Chairman BIDEN. Let me rephrase the question. Do you think it lived up to the standards and respect for the rule of law that you believe should have been upheld?

Mr. SIMS. In the context of my earlier comments, I think not, for these reasons. I think it was too rushed. We are only seeing now that the effort required much more time. Because of the brevity we did not have a full interagency deliberation of all of the issues. The experts were left out. And finally, I think we had a problem concerning the circulation of documents. Mr. Graybeal and Colonel Fitzgerald wrote a scholarly piece.

My question is, why did OSD not provide that document to Ambassador Nitze and the legal advisor until after they had already set their feet in concrete concerning the legal interpretation of the ABM Treaty?

Chairman BIDEN. It appears that you are saying that both ACDA general counsel and DOD general counsel were cut out of the process.

Mr. SIMS. I think I can speak confidently about the ACDA general counsel because I was in the office. I cannot speak confidently about the DOD general counsel. I can speak confidently about members in that office. For example, Jack McNeill had been the deputy general counsel at ACDA, he is extremely knowledgeable on these issues. He authored a memo in early October critical of the broad interpretation. I was not allowed to see that memo until after the decision had already been made, and I was the one trying to get the information to the legal advisor. The problem was that the experts were not included.

Chairman BIDEN. Why were you not allowed to see it?

Mr. SIMS. I do not know, sir. I was aware of it, asked to see it, and was denied.

Chairman BIDEN. What did they say to you?

Mr. SIMS. That they had no authorization to release it to me.

Chairman BIDEN. They just said denied, not denied because it is not relevant, not denied because it is in another office, not denied—they just said denied?

Mr. SIMS. Yes, sir.

Chairman BIDEN. Do you have an opinion as to why they denied you access?

Mr. SIMS. Sir, I do not have an opinion based on any knowledgeable facts. I am aware of a variety of hearsay, but I do not think it would do you any service for me to repeat that hearsay. I really do not have an opinion, to be honest.

Chairman BIDEN. Do you think this explains why Mr. McNeill could not come here today?

Mr. SIMS. Senator, I cannot say. The administration let me come here, and they were gracious enough to——

Chairman BIDEN. Well, they did not have a choice.

Mr. SIMS. They were gracious enough to let me have the opportunity to read my memorandum that I wrote for the file.

Chairman BIDEN. They are also gracious enough to know you resigned on principle. I am not sure that if I were the administration I would dare have told you not to come, but maybe you do not like to speculate about that.

Subsequent to your employment in the Legal Adviser's office you were employed at ACDA. And you worked at ACDA for the ACDA general counsel. You have been reported in the press to have written a memorandum for the record while at ACDA which was highly critical of the conclusions in the legal department's August 1986 memorandum.

Is that true?

Mr. SIMS. It is true, sir.

Chairman BIDEN. Why did you feel compelled to do so?

Mr. SIMS. It gets back to my comments earlier about a lawyer's responsibility as counselor. When presented with a policy that I could not agree with, I wanted to, prior to my departure——

Chairman BIDEN. What policy did you not agree with, SDI?

Mr. SIMS. I am sorry, not policy, no, procedure, the procedure followed in adopting the reinterpretation. I wanted, prior to my departure, to ensure that my clients were fully aware of an objective—of my assessment of the ABM Treaty, its text, subsequent interpretation, and negotiating record. I wanted to discharge that responsibility so that at least my clients had objective counsel prior to making a policy decision to adopt whichever interpretation they preferred. I wrote the memo, put it in ACDA's files, disseminated it to the desk officers, the Foreign Service officers, the civil servants, the lawyers, all within the State Department building so that at least they would be knowledgeable as to what my position was and as to how a rigorous analysis would support the narrow interpretation.

Chairman BIDEN. Mr. Sims, having participated centrally in the deliberation process from which emerged the so-called "reinterpretation," do you believe that the process produced a fair and objective airing of the views and a balanced and legally sound conclusion?

Mr. Sims. I think many of my earlier comments speak to that question. I think that because the process was short circuited, we did not have a full ventilation of the issues. What best supports that conclusion is the fact that 1½ years later the administration is still doing subsequent interpretation. That should have been done prior to authoring the decision memorandums for the President.

Senator **Specter.** Still doing what?

Mr. Sims. Subsequent interpretation. The succeeding memos that I am told will be forthcoming from the legal advisor's office. Those, as the earlier witnesses testified, the subsequent interpretation, are essential, and we need to look at those.

Chairman **Biden.** And Mr. Graybeal, you used two words earlier: "rewrite history." Do you think that is what the broad interpretation is attempting to do: "rewrite history"?

Mr. Graybeal. I was expressing a personal opinion.

Chairman **Biden.** That is all I am asking you. I am not asking for anything other than your opinion.

Mr. Graybeal. My opinion is that the U.S. instructions were clear. The delegation implemented them. The Soviets fully understood what was intended by article V, and I have trouble then when what I see and what I hear appears to go back to change the negotiating record, and I call that rewriting history. In my view this is what has happened, and I think it is not the way to implement treaties.

Chairman **Biden.** And one further question. Do you support the SDI Program?

Mr. Graybeal. I support the SDI program wholeheartedly. I think it is absolutely essential to U.S. security. It is a research program. That research program, about 80 percent of which was going on before the President made his March 23 speech. It has applications much broader than ABM. It is essential whether or not we ever deploy an ABM system, and I want to see it pursued rigorously and vigorously to provide the President ample information to make an intelligent decision at the appropriate time whether or not we want to deploy and if we make that decision we either amend the ABM Treaty to take it into account or withdraw from it to implement what is in the U.S. security interest.

Chairman **Biden.** I think you are both very articulate witnesses, and I think you both have a great deal of integrity because you both have been put in difficult spots having to come here, and I admire you, and I thank you for your testimony.

Chairman **Pell.** I would just add to Mr. Graybeal that you really are quite unique. Most of the people who support the narrow interpretation also oppose SDI, and the numbers of those who support the narrow interpretation and support SDI you can count on the fingers of one hand. And I admire the integrity involved. I think Senator Nunn is another example of somebody who believes in the narrow interpretation but yet is supportive of SDI in general. I notice that it breaks down those who oppose SDI, they are the ones who have a similar view on the treaty.

Mr. Graybeal. Thank you, sir.

Senator **Specter.** Mr. Graybeal, I did not quite understand your response to Senator Biden's question on rewriting history. I do not quite understand how you can say both that history is being rewritten and that Ambassador Nitze's position is illustrative of a good faith, intelligent conclusion that someone can come to that there is a basis to support the broad interpretation.

Mr. GRAYBEAL. That is the point I made before. I think that based on my knowledge, my experience with Karpov and expressing a personal opinion, in my view the Soviets did fully understand and they fully agreed. My point is that the specific details of those exchanges are nonexistent. You look at other parts of the record, and there are in the negotiating record per se sufficient ambiguities for a very rigorous analyst and an honest man to come to a different conclusion. So two people can come to different conclusions on that.

My personal conclusion is that this process is rewriting what actually transpired.

Senator SPECTER. But you are not saying that Ambassador Nitze is rewriting history in coming to a conclusion for a broad interpretation.

Mr. GRAYBEAL. No, sir.

Senator SPECTER. Mr. Sims, you said you were denied the document but you did not say who denied you the document.

Mr. SIMS. Sir?

Senator SPECTER. Would you define again for the record which document you were referring to?

Mr. SIMS. I am referring to the memorandum drafted by Jack McNeill, former deputy general counsel of ACDA, now currently in the general counsel's office of the Department of Defense, a career civil servant. He had authored a memo—I do not know the date—some time, I think, in early October, supportive of the narrow interpretation. During the 3 weeks, 2½, 3 weeks that I had to try to unearth all the documents for the legal advisor so that he could draft his memorandum, I was doing what I felt the interagency process should have done, going to everyone I could talk to to find out what in the world was in the record and to find out what the views were.

Senator SPECTER. Who denied you the document?

Mr. SIMS. I went down to Tom Graham's office. He said, that he had a memo, a memo from Jack McNeill. He had what we call a "boot-legged" copy. Tom Graham is the general counsel of the Arms Control and Disarmament Agency.

Senator SPECTER. Did you ask Jack McNeill for the document?

Mr. SIMS. No, Tom called Jack McNeill as I was standing there because Tom wanted to show me the document. Jack McNeill asked that he not show me the document. I did not press it any farther.

Senator SPECTER. Did you ask Judge Sofaer to act to get you access to the document?

Mr. SIMS. No, sir, I did not.

Senator SPECTER. Why not. He was your boss. Why did you not ask your boss to get you the document if you felt it was——

Mr. SIMS. I should have, sir. I know we talked about the document. I said: "I think there is something down there that we have not seen; I will have to continue to press for it."

The problem is that in this administration loyalty has been escalated to such a high level that objectivity seems to have been lost. I had to be very careful in terms of burning bridges between myself and other officers, and I did not want to harm Jack McNeill, who apparently, perhaps perceived that he should not have sent the memo over to Tom Graham.

So, I was hoping that I could uncover the documents on my own.

Senator SPECTER. I raise the question, Mr. Sims, because if your assertion is that some people are doing less than their job and you are trying to do your job, it would seem to me that you would go to your boss, the man you worked for, who has charged you with the responsibility, and say: "This is an important document; I need to see it."

Mr. SIMS. But unfortunately, most of the other players in this process did not have the luxury that I had in this reinterpretation effort. They were all career civil servants. They had not recently arrived in Government. I had the flexibility.

Senator SPECTER. We are talking about your luxury. You had the luxury of saying to Judge Sofaer: "I want the document."

Mr. SIMS. And possibly harm Jack McNeill. For example, before this very committee Tom Graham's name has been challenged for being disloyal because he has authored opinions contrary to the administration.

Senator SPECTER. Who challenged his loyalty?

Mr. SIMS. Senator Helms.

Senator SPECTER. Today?

Mr. SIMS. No, sir.

And, sir, that is why I acted the way that I did. I did not want to do an injustice to Jack McNeill. I had no idea if his memo should have been in Tom's hands. We were trying our best to get the information to the legal adviser.

Unfortunately, it was all funneled through me.

Senator SPECTER. Mr. Sims, with all due respect, I do not think the question is to whom you are doing an injustice. We all have a job to do. Our duties are to the American people.

We are supposed to do our jobs in the national interest. If you step on some toes, you step on some toes. And we are trying to find out what the facts are and we are trying to come to judgments on what the law is and we are trying to come to a conclusion about what we ought to do with SDI.

And I do not think that we can gauge any of our views as to whose toes we are stepping on. When you assert that you resigned as a matter of principle, I find it hard to understand why you did not go to your boss, whatever it did to Graham or McNeill or to Sofaer or to Specter or Biden or Pell or whoever, and say: "I want the document, I cannot do this job unless I have the document."

Now, why did you not do that?

Mr. SIMS. I had confidence that I, hopefully, could do the job on my own without sacrificing Jack McNeill for divulging a memo that he should not have divulged.

Senator SPECTER. Well, I think you might have to sacrifice somebody before you resign as a matter of principle.

Let me ask you one final question, what I hope is a final question.

Chairman **Biden**. It will not be. I have a couple related to your questions.

Senator **Specter**. Well, let me ask you the question anyway. Do you disagree with what Mr. Graybeal has testified to, that there is ample room on the negotiating record for a good faith interpretation by Ambassador Nitze for the broad interpretation?

Mr. **Sims**. Senator, I do.

Senator **Specter**. Thank you.

Chairman **Biden**. Let me ask you, if I can, Mr. Sims, is there any doubt in your mind that Judge Sofaer was aware that there were dissenting views that had been written in other agencies in the Government from his broad interpretation?

Mr. **Sims**. It depends on the timeframe. I know after the October 11 NSPG—I do not know what it means; it is the NSC primarily.

Chairman **Biden**. That is OK. I do not know half the acronyms up here.

Mr. **Sims**. Immediately prior to the October 11th NSPG was the first time a dissenting view reached all the principles. Much to ACDA's credit—and that is how the system is supposed to work. The lawyers in the ACDA general counsel's office looked at the record. They authored a 1½-page memo.

Tom Graham worked it up through his agency. Ken Adelman consented to release of that memorandum to the principal players at the NSPG meeting. The memo was delivered during the night of, I think, October 3—I am sorry, October 10, prior to the October 11 meeting.

But at least the participants at that meeting had access to such a memo and knew there was a contrary view. For that act, Ken Adelman was criticized by this committee for being unable to control his general counsel. So my point is, that that memorandum was the first time that one of the arms of Government provided a dissenting view to all the principles in the interagency process.

Chairman **Biden**. I think you did pretty well. Let me insert for the record, if I may, a letter from Senator Nunn to me stating that Judge Sofaer's testimony misrepresented Senator Nunn's views.

Second, I would like to submit for the record Judge Sofaer's letter to Time magazine, to which I referred earlier in my testimony.

Third, I would like a statement of six former Secretaries of Defense, three Republicans, three Democrats, supporting the traditional interpretation, to be inserted in the record.

And fourth, a statement by eight of the nine ABM negotiators supporting the traditional interpretation of the treaty.

And last, letters to me and you, Senator Pell, from Professors Henkin and Tribe commenting on Judge Sofaer's critique of Senate Resolution 167.

And I close by reiterating that I think the testimony both of you have given is as straightforward and as sensitive as you could possibly do, I think you did a heck of a job, and I sympathize with the difficulty of the way in which it had to be done.

Chairman **Pell**. Those documents will be inserted without objection into the record.

[The material referred to appears in the appendix.]

Chairman **Pell**. The committee will be recessed for a moment as we move into a closed session in the backroom here. There is not intended to be an open session after this, so the press need not wait around.

[Whereupon, at 1 p.m., the committee recessed, to reconvene in executive session.]

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III

100TH CONGRESS
1ST SESSION

S. RES. 167

Concerning constitutional principles pertinent to the making of treaties, and further concerning the interpretation of the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems.

IN THE SENATE OF THE UNITED STATES

MARCH 12, 1987

Mr. BIDEN submitted the following resolution; which was referred to the Committee on Foreign Relations

---

RESOLUTION

Concerning constitutional principles pertinent to the making of treaties, and further concerning the interpretation of the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems.

Resolved, That this resolution may be referred to as the "ABM Treaty Interpretation Resolution".

THE TREATY POWER

SEC. 2. The Senate finds as follows:

(1)(A) Article II, section 2, clause 2 of the United States Constitution provides that the President "shall have power, by and with the advice and consent of the

Senate, to make treaties, provided two-thirds of the Senators present concur".

(B) If, following Senate advice and consent, the President proceeds to ratify a treaty, the President may ratify only the treaty to which the Senate advised and consented.

(2)(A) Under the United States Constitution, during the period in which a treaty is in force, the meaning of that treaty is what the Senate understands the treaty to mean when it gives its advice and consent, a meaning which is informed by reference to expressions of intent by the Senate as well as Senate acquiescence in any interpretation communicated by the Executive.

(B) In the absence of any evidence concerning how the Senate understands such treaty, it is properly interpreted by reference to its text, as reasonably construed, in light of its context and object and purpose.

(C) To the extent the meaning of a treaty is clear under subparagraphs (A) and (B), anything not transmitted to the Senate at such time, including the negotiating record, is not relevant to the meaning of the treaty.

(3) The President may not amend a treaty without the agreement of the Parties and the advice and consent of the Senate.

(4)(A) Under Article II, section 3, clause 4 of the Constitution, the President is required to "take care that the laws be faithfully executed".

(B) For purposes of such provision, during the period in which a treaty is in force, it constitutes a law.

(C) The President is required to take care that each such treaty be faithfully executed.

SENATE CONSIDERATION OF THE ABM TREATY

SEC. 3. The Senate further finds as follows:

(1) On May 26, 1972, the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems (hereafter in this resolution referred to as the "Treaty") was signed by the two Parties.

(2) On June 13, 1972, the President of the United States transmitted the Treaty to the Senate and requested that the Senate advise and consent to its ratification.

(3) On August 3, 1972, the Senate, by a vote of 88–2, gave its advice and consent to ratification of the Treaty.

(4) Between June 6, 1972, and August 3, 1972, representatives of the President communicated to the Senate the interpretation of the President concerning various provisions of the Treaty.

TEXT OF THE ABM TREATY

SEC. 4. The Senate further finds as follows:

(1) Article I of the Treaty provides that "Each Party undertakes not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense", except for certain limited deployments of fixed, land-based systems as stipulated in Article III.

(2) Article II of the Treaty provides that an "ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory" and notes that such systems "currently" consist of ABM interceptor missiles, ABM launchers, and ABM radars.

(3) Article V of the Treaty provides that "Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.".

(4) Article XIV of the Treaty provides that "Each Party may propose amendments to this Treaty.".

(5) Article XV of the Treaty provides that "This Treaty shall be of unlimited duration.".

(6) Article XV of the Treaty provides further that "Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests".

(7) Agreed Statement D, which was transmitted to the Senate as part of the Treaty, is intended "to insure the fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty", by providing that, if fixed land-based "ABM systems based upon other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future", their deployment would be subject to amendment by the Parties in accordance with Article XIV.

INTERPRETIVE COMMUNICATIONS OF THE EXECUTIVE DURING SENATE CONSIDERATION OF THE TREATY

SEC. 5. The Senate further finds that, during Senate consideration of the Treaty, representatives of the President communicated to the Senate—

(1)(A) with respect to Article II thereof, that the term "ABM systems and components" should be construed functionally, meaning that the term was not limited to currently existing technology or any specific technology, but applied to any ABM systems and components functionally able to counter strategic ballistic missiles or their elements in flight trajectory;

(B) that among such representations affirming that Article II should be construed functionally was the Secretary of State's formal Letter of Submittal, dated June 10, 1972, which stated that "Article II(1) defines an ABM system in terms of its function as 'a system to counter strategic ballistic missiles or their elements in flight trajectory,' noting that such systems 'currently' consist of ABM interceptor missiles, ABM launchers, and ABM radars"; and

(2) consequently, with respect to Article V thereof, that the undertaking not to develop, test, or deploy any sea-based, air-based, space-based, or mobile land-based ABM system or components should be construed as applicable to any ABM system functionally able to counter strategic ballistic missiles or their elements in flight trajectory.

INTERPRETIVE COMMUNICATIONS OF THE EXECUTIVE FOLLOWING RATIFICATION OF THE ABM TREATY

SEC. 6. The Senate further finds as follows:

(1) After ratification of the Treaty, representatives of the President formally and consistently reaffirmed that the prohibition in Article V of the Treaty applies to the development, testing, and deployment of any

sea-based, air-based, space-based, or mobile land-based ABM systems and components designed to counter strategic ballistic missiles or their elements in flight trajectory.

(2) Beginning in 1978 (the first year an annual Arms Control Impact Statement was required to be submitted to Congress), the Arms Control and Disarmament Agency, on behalf of the President, consistently reaffirmed that the Treaty prohibits the development, testing, and deployment of all types of sea-based, air-based, space-based, or mobile land-based ABM systems and components, including ABM systems and components involving technologies not in existence when the Treaty was ratified.

(3) Among such statements was the 1985 Arms Control Impact Statement, which stated that "the ABM Treaty prohibition on development, testing, and deployment of space-based ABM systems, or components for such systems, applies to directed energy technologies (or any other technology) used for this purpose.".

OBJECT AND PURPOSE OF THE ABM TREATY

SEC. 7. The Senate further finds as follows:

(1) The object and purpose of the ABM Treaty is set out in Article I of the Treaty, in which each Party undertakes "not to deploy ABM systems for a defense

of the territory of its country and not to provide a base for such a defense".

(2) Inasmuch as Article XV stipulated a Treaty of unlimited duration, the functional interpretation of Article II is central to such object and purpose of the Treaty because technological advancement would render significant prohibitions in the Treaty inoperative if Article II were construed to apply only to ABM systems and components existing on the date of ratification.

(3) Also central to such object and purpose is the prohibition against the development, testing, or deployment of any sea-based, air-based, space-based, or mobile land-based ABM systems or components for the purpose of countering strategic ballistic missiles or their elements in flight trajectory, including ABM systems or components involving exotic technologies.

(4) This prohibition was communicated to the Senate during its consideration of the Treaty.

(5) This prohibition is supported by interpretive communications of the Executive while the Treaty was under consideration, by expressions of Senate intent during such period, and by subsequent, consistent practice and interpretation by both Parties to the Treaty.

DECLARATION OF POLICY

SEC. 8. The Senate therefore declares that—

(1) under the Constitution, a treaty made by the United States is a treaty to which the Senate advised and consented, and is properly interpreted by reference to the text placed before the Senate, subject to any relevant and material Executive communications to the Senate during its consideration of the treaty and any interpretation expressed by the Senate in advising and consenting to ratification;

(2) the development, testing, or deployment of any sea-based, air-based, space-based, or mobile land-based ABM systems or components for the purpose of countering strategic ballistic missiles or their elements in flight trajectory, including ABM systems or components involving technologies not in existence when the Treaty was ratified, would be inconsistent with the provisions of the Treaty and would require an amendment to the Treaty; and

(3) no amendment to the ABM Treaty may occur without the agreement of the Parties and the advice and consent of the Senate.

○

S. RES. 167
(AS AMENDED AND REPORTED)

RESOLUTION

CONCERNING CONSTITUTIONAL PRINCIPLES PERTINENT TO THE MAKING OF TREATIES, AND FURTHER CONCERNING THE INTERPRETATION OF THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS ON THE LIMITATION OF ANTI-BALLISTIC MISSILE SYSTEMS.

RESOLVED, THAT THIS RESOLUTION MAY BE REFERRED TO AS THE "ABM TREATY INTERPRETATION RESOLUTION.".

THE TREATY POWER

SEC. 2. THE SENATE FINDS AS FOLLOWS:

(1)(A) ARTICLE II, SECTION 2, CLAUSE 2 OF THE UNITED STATES CONSTITUTION PROVIDES THAT THE PRESIDENT "SHALL HAVE POWER, BY AND WITH THE ADVICE AND CONSENT OF THE SENATE, TO MAKE TREATIES, PROVIDED TWO-THIRDS OF THE SENATORS PRESENT CONCUR".

(B) IF, FOLLOWING SENATE ADVICE AND CONSENT, THE PRESIDENT PROCEEDS TO RATIFY A TREATY, THE PRESIDENT MAY RATIFY ONLY THE TREATY TO WHICH THE SENATE ADVISED AND CONSENTED.

(2) UNDER THE UNITED STATES CONSTITUTION --

(A) A TREATY IS PROPERLY INTERPRETED IN GOOD FAITH IN ACCORDANCE WITH THE ORDINARY MEANING TO BE GIVEN ITS TERMS IN LIGHT OF THEIR CONTEXT AND IN LIGHT OF ITS OBJECT AND PURPOSE;

(B) THE MEANING IS TO BE DETERMINED IN LIGHT OF WHAT THE SENATE UNDERSTANDS THE TREATY TO MEAN WHEN IT GIVES ITS ADVICE AND CONSENT;

(C) THE UNDERSTANDING OF THE SENATE IS MANIFESTED BY ANY FORMAL EXPRESSION OF UNDERSTANDING BY THE SENATE, AS WELL AS BY OTHER EVIDENCE OF WHAT THE SENATE UNDERSTOOD THE TREATY TO MEAN, INCLUDING SENATE APPROVAL OR ACCEPTANCE OF, OR SENATE ACQUIESCENCE IN, INTERPRETATIONS OF THE TREATY BY THE EXECUTIVE BRANCH COMMUNICATED TO THE SENATE;

(D) THE SENATE'S UNDERSTANDING OF A TREATY CANNOT BE INFORMED BY MATTER OF WHICH IT IS NOT AWARE, SUCH AS PRIVATE STATEMENTS MADE DURING THE NEGOTIATIONS THAT WERE NOT COMMUNICATED TO THE SENATE; AND

(E) ANY SUBSEQUENT PRACTICE BETWEEN THE PARTIES IN THE APPLICATION OF THE TREATY IS TO BE TAKEN INTO ACCOUNT IN INTERPRETING THE TREATY.

(3) THE PRESIDENT MAY NOT AMEND A TREATY WITHOUT THE AGREEMENT OF THE PARTIES AND THE ADVICE AND CONSENT OF THE SENATE.

(4)(A) ARTICLE VI OF THE CONSTITUTION PROVIDES THAT "ALL TREATIES MADE....SHALL BE THE SUPREME LAW OF THE LAND".

(B) UNDER ARTICLE II, SECTION 3, CLAUSE 4 OF THE CONSTITUTION, THE PRESIDENT IS REQUIRED TO "TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED".

SENATE CONSIDERATION OF THE ABM TREATY

SEC. 3. THE SENATE FURTHER FINDS AS FOLLOWS:

(1) ON MAY 26, 1972, THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS ON THE LIMITATION OF ANTI-BALLISTIC MISSILE SYSTEMS (HEREAFTER IN THIS RESOLUTION REFERRED TO AS THE "TREATY") WAS SIGNED BY THE TWO PARTIES.

(2) ON JUNE 13, 1972, THE PRESIDENT OF THE UNITED STATES TRANSMITTED THE TREATY TO THE SENATE AND REQUESTED THAT THE SENATE ADVISE AND CONSENT TO ITS RATIFICATION.

(3) ON AUGUST 3, 1972, THE SENATE, BY A VOTE OF 88-2, GAVE ITS ADVICE AND CONSENT TO RATIFICATION OF THE TREATY.

(4) BETWEEN JUNE 6, 1972, AND AUGUST 3, 1972, REPRESENTATIVES OF THE PRESIDENT COMMUNICATED TO THE SENATE THE INTERPRETATION OF THE PRESIDENT CONCERNING VARIOUS PROVISIONS OF THE TREATY.

TEXT OF THE ABM TREATY

SEC. 4. THE SENATE FURTHER FINDS AS FOLLOWS:

(1) ARTICLE I OF THE TREATY PROVIDES THAT "EACH PARTY UNDERTAKES NOT TO DEPLOY ABM SYSTEMS FOR A DEFENSE OF THE TERRITORY OF ITS COUNTRY AND NOT TO PROVIDE A BASE FOR SUCH A DEFENSE", EXCEPT FOR CERTAIN LIMITED DEPLOYMENTS OF FIXED, LAND-BASED SYSTEMS AS STIPULATED IN ARTICLE III.

(2) ARTICLE II OF THE TREATY PROVIDES THAT AN "ABM SYSTEM IS A SYSTEM TO COUNTER STRATEGIC BALLISTIC MISSILES OR THEIR ELEMENTS IN FLIGHT TRAJECTORY" AND NOTES THAT SUCH SYSTEMS "CURRENTLY" CONSIST OF ABM INTERCEPTOR MISSILES, ABM LAUNCHERS, AND ABM RADARS.

(3) ARTICLE V OF THE TREATY PROVIDES THAT "EACH PARTY UNDERTAKES NOT TO DEVELOP, TEST, OR DEPLOY ABM SYSTEMS OR COMPONENTS WHICH ARE SEA-BASED, AIR-BASED, SPACE-BASED, OR MOBILE LAND-BASED.".

(4) ARTICLE XIV OF THE TREATY PROVIDES THAT "EACH PARTY MAY PROPOSE AMENDMENTS TO THIS TREATY.".

(5) ARTICLE XV OF THE TREATY PROVIDES THAT "THIS TREATY SHALL BE OF UNLIMITED DURATION.".

(6) ARTICLE XV OF THE TREATY PROVIDES FURTHER THAT "EACH PARTY SHALL, IN EXERCISING ITS NATIONAL SOVEREIGNTY, HAVE THE RIGHT TO WITHDRAW FROM THIS TREATY IF IT DECIDES THAT EXTRAORDINARY EVENTS RELATED TO THE SUBJECT MATTER OF THIS TREATY HAVE JEOPARDIZED ITS SUPREME INTERESTS".

(7) AGREED STATEMENT D, WHICH WAS TRANSMITTED TO THE SENATE AS PART OF THE TREATY, IS INTENDED "TO INSURE THE FULFILLMENT OF THE OBLIGATION NOT TO DEPLOY ABM SYSTEMS AND THEIR COMPONENTS EXCEPT AS PROVIDED IN ARTICLE III OF THE TREATY", BY PROVIDING THAT, IF FIXED LAND-BASED "ABM SYSTEMS BASED UPON OTHER PHYSICAL PRINCIPLES AND INCLUDING COMPONENTS CAPABLE OF SUBSTITUTING FOR ABM INTERCEPTOR MISSILES, ABM LAUNCHERS, OR ABM RADARS ARE CREATED IN THE FUTURE", THEIR DEPLOYMENT WOULD BE SUBJECT TO AMENDMENT BY THE PARTIES IN ACCORDANCE WITH ARTICLE XIV.

INTERPRETIVE COMMUNICATIONS OF THE EXECUTIVE DURING SENATE CONSIDERATION OF THE TREATY

SEC. 5. THE SENATE FURTHER FINDS THAT, DURING SENATE CONSIDERATION OF THE TREATY, REPRESENTATIVES OF THE PRESIDENT COMMUNICATED TO THE SENATE --

(1)(A) WITH RESPECT TO ARTICLE II THEREOF, THAT THE TERM "ABM SYSTEMS AND COMPONENTS" SHOULD BE CONSTRUED FUNCTIONALLY, MEANING THAT THE TERM WAS NOT LIMITED TO CURRENTLY EXISTING TECHNOLOGY OR ANY SPECIFIC TECHNOLOGY, BUT APPLIED TO ANY ABM SYSTEMS AND COMPONENTS FUNCTIONALLY ABLE TO COUNTER STRATEGIC BALLISTIC MISSILES OR THEIR ELEMENTS IN FLIGHT TRAJECTORY;

(B) THAT AMONG SUCH REPRESENTATIONS AFFIRMING THAT ARTICLE II SHOULD BE CONSTRUED FUNCTIONALLY WAS THE SECRETARY OF STATE'S FORMAL LETTER OF SUBMITTAL, DATED JUNE 10, 1972, WHICH STATED (IN A SECTION ENTITLED "FUTURE ABM SYSTEMS") THAT "ARTICLE II(1) DEFINES AN ABM SYSTEM IN TERMS OF ITS FUNCTION AS A 'SYSTEM TO COUNTER STRATEGIC BALLISTIC MISSILES OR THEIR ELEMENTS IN FLIGHT TRAJECTORY,' NOTING THAT SUCH SYSTEMS 'CURRENTLY' CONSIST OF ABM INTERCEPTOR MISSILES, ABM LAUNCHERS, AND ABM RADARS"; AND

(2) CONSEQUENTLY, WITH RESPECT TO ARTICLE V THEREOF, THAT THE UNDERTAKING NOT TO DEVELOP, TEST, OR DEPLOY ANY SEA-BASED,

AIR-BASED, SPACE-BASED, OR MOBILE LAND-BASED ABM SYSTEM OR COMPONENTS SHOULD BE CONSTRUED AS APPLICABLE TO ANY ABM SYSTEM FUNCTIONALLY ABLE TO COUNTER STRATEGIC BALLISTIC MISSILES OR THEIR ELEMENTS IN FLIGHT TRAJECTORY.

INTERPRETIVE COMMUNICATIONS OF THE EXECUTIVE FOLLOWING RATIFICATION OF THE ABM TREATY

SEC 6. THE SENATE FURTHER FINDS AS FOLLOWS:

(1) AFTER RATIFICATION OF THE TREATY, REPRESENTATIVES OF THE PRESIDENT FORMALLY AND CONSISTENTLY REAFFIRMED THAT THE PROHIBITION IN ARTICLE V OF THE TREATY APPLIES TO THE DEVELOPMENT, TESTING, AND DEPLOYMENT OF ANY SEA-BASED, AIR-BASED, SPACE-BASED, OR MOBILE LAND-BASED ABM SYSTEMS AND COMPONENTS DESIGNED TO COUNTER STRATEGIC BALLISTIC MISSILES OR THEIR ELEMENTS IN FLIGHT TRAJECTORY.

(2) BEGINNING IN 1978 (THE FIRST YEAR AN ANNUAL ARMS CONTROL IMPACT STATEMENT WAS REQUIRED TO BE SUBMITTED TO CONGRESS), THE ARMS CONTROL AND DISARMAMENT AGENCY, ON BEHALF OF THE PRESIDENT, CONSISTENTLY REAFFIRMED THAT THE TREATY PROHIBITS THE DEVELOPMENT, TESTING, AND DEPLOYMENT OF ALL TYPES OF SEA-BASED, AIR-BASED, SPACE-BASED, OR MOBILE LAND-BASED ABM SYSTEMS AND COMPONENTS, INCLUDING ABM SYSTEMS AND COMPONENTS INVOLVING TECHNOLOGIES NOT IN EXISTENCE WHEN THE TREATY WAS RATIFIED.

(3) AMONG SUCH STATEMENTS WAS THE 1985 ARMS CONTROL IMPACT STATEMENT, WHICH STATED THAT "THE ABM TREATY PROHIBITION ON DEVELOPMENT, TESTING, AND DEPLOYMENT OF SPACE-BASED ABM SYSTEMS, OR COMPONENTS FOR SUCH SYSTEMS, APPLIES TO DIRECTED ENERGY TECHNOLOGIES (OR ANY OTHER TECHNOLOGY) USED FOR THIS PURPOSE.".

OBJECT AND PURPOSE OF THE ABM TREATY

SEC. 7. THE SENATE FURTHER FINDS AS FOLLOWS:

(1) THE OBJECT AND PURPOSE OF THE ABM TREATY IS SET OUT IN ARTICLE I OF THE TREATY, IN WHICH EACH PARTY UNDERTAKES "NOT TO DEPLOY ABM SYSTEMS FOR A DEFENSE OF THE TERRITORY OF ITS COUNTRY AND NOT TO PROVIDE A BASE FOR SUCH A DEFENSE".

(2) INASMUCH AS ARTICLE XV STIPULATED A TREATY OF UNLIMITED DURATION, THE FUNCTIONAL INTERPRETATION OF ARTICLE II IS CENTRAL TO SUCH OBJECT AND PURPOSE OF THE TREATY BECAUSE TECHNOLOGICAL ADVANCEMENT WOULD RENDER SIGNIFICANT PROHIBITIONS IN THE TREATY INOPERATIVE IF ARTICLE II WERE CONSTRUED TO APPLY ONLY TO ABM SYSTEMS AND COMPONENTS EXISTING ON THE DATE OF RATIFICATION.

(3) ALSO CENTRAL TO SUCH OBJECT AND PURPOSE IS THE PROHIBITION AGAINST THE DEVELOPMENT, TESTING, OR DEPLOYMENT OF ANY SEA-BASED, AIR-BASED, SPACE-BASED, OR MOBILE LAND-BASED ABM SYSTEMS OR COMPONENTS FOR THE PURPOSE OF COUNTERING STRATEGIC BALLISTIC MISSILES OR THEIR ELEMENTS IN FLIGHT TRAJECTORY, INCLUDING ABM SYSTEMS OR COMPONENTS INVOLVING EXOTIC TECHNOLOGIES.

(4) THIS PROHIBITION WAS COMMUNICATED TO THE SENATE DURING ITS CONSIDERATION OF THE TREATY.

(5) THIS PROHIBITION IS SUPPORTED BY INTERPRETIVE COMMUNICATIONS OF THE EXECUTIVE WHILE THE TREATY WAS UNDER CONSIDERATION, BY EXPRESSIONS OF SENATE INTENT DURING SUCH PERIOD, AND BY SUBSEQUENT, CONSISTENT PRACTICE AND INTERPRETATION BY BOTH PARTIES TO THE TREATY.

DECLARATION OF POLICY

SEC. 8. THE SENATE THEREFORE DECLARES THAT --

(1) UNDER THE UNITED STATES CONSTITUTION, THE MEANING OF A TREATY IS PROPERLY DETERMINED IN ACCORDANCE WITH THE PRINCIPLES SET FORTH IN PARAGRAPH (2) OF SECTION 2 OF THIS RESOLUTION.

(2) THE DEVELOPMENT, TESTING, OR DEPLOYMENT OF ANY SEA-BASED, AIR-BASED, SPACE-BASED, OR MOBILE LAND-BASED ABM SYSTEMS OR COMPONENTS FOR THE PURPOSE OF COUNTERING STRATEGIC BALLISTIC MISSILES OR THEIR ELEMENTS IN FLIGHT TRAJECTORY, INCLUDING ABM SYSTEMS OR COMPONENTS INVOLVING TECHNOLOGIES NOT IN EXISTENCE WHEN THE TREATY WAS RATIFIED, WOULD BE INCONSISTENT WITH THE PROVISIONS OF THE TREATY AND WOULD REQUIRE AN AMENDMENT TO THE TREATY; AND

(3) NO AMENDMENT TO THE ABM TREATY MAY OCCUR WITHOUT THE AGREEMENT OF THE PARTIES AND THE ADVICE AND CONSENT OF THE SENATE.

Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems

Signed at Moscow May 26, 1972
Ratification advised by U.S. Senate August 3, 1972
Ratified by U.S. President September 30, 1972
Proclaimed by U.S. President October 3, 1972
Instruments of ratification exchanged October 3, 1972
Entered into force October 3, 1972

The United States of America and the Union of Soviet Socialist Republics, hereinafter referred to as the Parties,

Proceeding from the premise that nuclear war would have devastating consequences for all mankind,

Considering that effective measures to limit anti-ballistic missile systems would be a substantial factor in curbing the race in strategic offensive arms and would lead to a decrease in the risk of outbreak of war involving nuclear weapons,

Proceeding from the premise that the limitation of anti-ballistic missile systems, as well as certain agreed measures with respect to the limitation of strategic offensive arms, would contribute to the creation of more favorable conditions for further negotiations on limiting strategic arms,

Mindful of their obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons,

Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to take effective measures toward reductions in strategic arms, nuclear disarmament, and general and complete disarmament,

Desiring to contribute to the relaxation of international tension and the strengthening of trust between States,

Have agreed as follows:

Article I

1. Each party undertakes to limit anti-ballistic missile (ABM) systems and to adopt other measures in accordance with the provisions of this Treaty.

2. Each Party undertakes not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense, and not to deploy ABM systems for defense of an individual region except as provided for in Article III of this Treaty.

Article II

1. For the purpose of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of:

(a) ABM interceptor missiles, which are interceptor missiles constructed and deployed for an ABM role, or of a type tested in an ABM mode;

(b) ABM launchers, which are launchers constructed and deployed for launching ABM interceptor missiles; and

(c) ABM radars, which are radars constructed and deployed for an ABM role, or of a type tested in an ABM mode.

2. The ABM system components listed in paragraph 1 of this Article include those which are:

(a) operational;
(b) under construction;
(c) undergoing testing;
(d) undergoing overhaul, repair or conversion; or
(e) mothballed.

Article III

Each Party undertakes not to deploy ABM systems or their components except that:

(a) within one ABM system deployment area having a radius of one hundred and fifty kilometers and centered on the Party's national capital, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, and (2) ABM radars within no more than six ABM radar complexes, the area of each complex being circular and having a diameter of no more than three kilometers; and

(b) within one ABM system deployment area having a radius of one hundred and fifty kilometers and containing ICBM silo launchers, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, (2) two large phased-array ABM radars comparable in potential to corresponding ABM radars operational or under construction on the date of signature of the Treaty in an ABM system deployment area containing ICBM silo launchers, and (3) no more than eighteen ABM radars each having a potential less than the potential of the smaller of the above-mentioned two large phased-array ABM radars.

Article IV

The limitations provided for in Article III shall not apply to ABM systems or their components used for development or testing, and located within current or additionally agreed test ranges. Each Party may have no more than a total of fifteen ABM launchers at test ranges.

Article V

1. Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.

2. Each Party undertakes not to develop, test, or deploy ABM launchers for launching more than one ABM interceptor missile at a time from each launcher, not to modify deployed launchers to provide them with such a capability, not to develop, test, or deploy automatic or semi-automatic or other similar systems for rapid reload of ABM launchers.

Article VI

To enhance assurance of the effectiveness of the limitations on ABM systems and their components provided by the Treaty, each Party undertakes:

(a) not to give missiles, launchers, or radars, other than ABM interceptor missiles, ABM launchers, or ABM radars, capabilities to counter strategic ballistic missiles or their elements in flight trajectory, and not to test them in an ABM mode; and

(b) not to deploy in the future radars for early warning of strategic ballistic missile attack except at locations along the periphery of its national territory and oriented outward.

Article VII

Subject to the provisions of this Treaty, modernization and replacement of ABM systems or their components may be carried out.

Article VIII

ABM systems or their components in excess of the numbers or outside the areas specified in this Treaty, as well as ABM systems or their components prohibited by this Treaty, shall be destroyed or dismantled under agreed procedures within the shortest possible agreed period of time.

Article IX

To assure the viability and effectiveness of this Treaty, each Party undertakes not to transfer to other States, and not to deploy outside its national territory, ABM systems or their components limited by this Treaty.

Article X

Each Party undertakes not to assume any international obligations which would conflict with this Treaty.

Article XI

The Parties undertake to continue active negotiations for limitations on strategic offensive arms.

Article XII

1. For the purpose of providing assurance of compliance with the provisions of this Treaty, each Party shall use national technical means of verification at its disposal in a manner consistent with generally recognized principles of international law.

2. Each Party undertakes not to interfere with the national technical means of verification of the other Party operating in accordance with paragraph 1 of this Article.

3. Each Party undertakes not to use deliberate concealment measures which impede verification by national technical means of compliance with the provisions of this Treaty. This obligation shall not require changes in current construction, assembly, conversion, or overhaul practices.

Article XIII

1. To promote the objectives and implementation of the provisions of this Treaty, the Parties shall establish promptly a Standing Consultative Commission, within the framework of which they will:

(a) consider questions concerning compliance with the obligations assumed and related situations which may be considered ambiguous;

(b) provide on a voluntary basis such information as either Party considers necessary to assure confidence in compliance with the obligations assumed;

(c) consider questions involving unintended interference with national technical means of verification;

(d) consider possible changes in the strategic situation which have a bearing on the provisions of this Treaty;

(e) agree upon procedures and dates for destruction or dismantling of ABM systems or their components in cases provided for by the provisions of this Treaty;

(f) consider, as appropriate, possible proposals for further increasing the viability of this Treaty; including proposals for amendments in accordance with the provisions of this Treaty;

(g) consider, as appropriate, proposals for further measures aimed at limiting strategic arms.

2. The Parties through consultation shall establish, and may amend as appropriate, Regulations for the Standing Consultative Commission governing procedures, composition and other relevant matters.

Article XIV

1. Each Party may propose amendments to this Treaty. Agreed amendments shall enter into force in accordance with the procedures governing the entry into force of this Treaty.

2. Five years after entry into force of this Treaty, and at five-year intervals thereafter, the Parties shall together conduct a review of this Treaty.

Article XV

1. This Treaty shall be of unlimited duration.

2. Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. It shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty. Such notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests.

Article XVI

1. This Treaty shall be subject to ratification in accordance with the constitutional procedures of each Party. The Treaty shall enter into force on the day of the exchange of instruments of ratification.

2. This Treaty shall be registered pursuant to Article 102 of the Charter of the United Nations.

DONE at Moscow on May 26, 1972, in two copies, each in the English and Russian languages, both texts being equally authentic.

FOR THE UNITED STATES OF AMERICA	FOR THE UNION OF SOVIET SOCIALIST REPUBLICS
RICHARD NIXON	L. I. BREZHNEV
President of the United States of America	*General Secretary of the Central Committee of the CPSU*

Agreed Statements, Common Understandings, and Unilateral Statements Regarding the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missiles

1. Agreed Statements

The document set forth below was agreed upon and initialed by the Heads of the Delegations on May 26, 1972 (letter designations added);

AGREED STATEMENTS REGARDING THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS ON THE LIMITATION OF ANTI-BALLISTIC MISSILE SYTEMS

[A]

The Parties understand that, in addition to the ABM radars which may be deployed in accordance with subparagraph (a) of Article III of the Treaty, those non-phased-array ABM radars operational on the date of signature of the Treaty within the ABM system deployment area for defense of the national capital may be retained.

[B]

The Parties understand that the potential (the product of mean emitted power in watts and antenna area in square meters) of the smaller of the two large phased-array ABM radars referred to in subparagraph (b) of Article III of the Treaty is considered for purposes of the Treaty to be three million.

[C]

The Parties understand that the center of the ABM system deployment area centered on the national capital and the center of the ABM system deployment area containing ICBM silo launchers for each Party shall be separated by no less than thirteen hundred kilometers.

[D]

In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty.

[E]

The Parties understand that Article V of the Treaty includes obligations not to develop, test or deploy ABM interceptor missiles for the delivery by each ABM interceptor missile of more than one independently guided warhead.

[F]

The Parties agree not to deploy phased-array radars having a potential (the product of mean emitted power in watts and antenna area in square meters) exceeding three million, except as provided for in Articles III, IV and VI of the Treaty, or except for the purposes of tracking objects in outer space or for use as national technical means of verification.

[G]

The Parties understand that Article IX of the Treaty includes the obligation of the US and the USSR not to provide to other States technical descriptions or blue prints specially worked out for the construction of ABM systems and their components limited by the Treaty.

2. Common Understandings

Common understanding of the Parties on the following matters was reached during the negotiations:

A. Location of ICBM Defenses

The U.S. Delegation made the following statement on May 26, 1972:

Article III of the ABM Treaty provides for each side one ABM system deployment area centered on its national capital and one ABM system deployment area containing ICBM silo launchers. The two sides have registered agreement on the following statement: "The Parties understand that the center of the ABM system deployment area centered on the national capital and the center of the ABM system deployment area containing ICBM silo launchers for each Party shall be separated by no less than thirteen hundred kilometers." In this connection, the U.S. side notes that its ABM system deployment area for defense of ICBM silo launchers, located west of the Mississippi River, will be centered in the Grand Forks ICBM silo launcher deployment area. (See Agreed Statement [C].)

B. ABM Test Ranges

The U.S. Delegation made the following statement on April 26, 1972:

Article IV of the ABM Treaty provides that "the limitations provided for in Article III shall not apply to ABM systems or their components used for development or testing, and located within current or additionally agreed test ranges." We believe it would be useful to assure that there is no misunderstanding as to current ABM test ranges. It is our understanding that ABM test ranges encompass the area within which ABM components are located for test purposes. The current U.S. ABM test ranges are at White Sands, New Mexico, and at Kwajalein Atoll, and the current Soviet ABM test range is near Sary Shagan in Kazakhstan. We consider that non-phased array radars of types used for range safety or instrumentation purposes may be located outside of ABM test ranges. We interpret the reference in Article IV to "additionally agreed test ranges" to mean that ABM components will not be located at any other test ranges without prior agreement between our Governments that there will be such additional ABM test ranges.

On May 5, 1972, the Soviet Delegation stated that there was a common understanding on what ABM test ranges were, that the use of the types of non-ABM radars for range safety or instrumentation was not limited under the Treaty, that the reference in Article IV to "additionally agreed" test ranges was sufficiently clear, and that national means permitted identifying current test ranges.

C. Mobile ABM Systems

On January 29, 1972, the U.S. Delegation made the following statement:

> Article V(1) of the Joint Draft Text of the ABM Treaty includes an undertaking not to develop, test, or deploy mobile land-based ABM systems and their components. On May 5, 1971, the U.S. side indicated that, in its view, a prohibition on deployment of mobile ABM systems and components would rule out the deployment of ABM launchers and radars which were not permanent fixed types. At that time, we asked for the Soviet view of this interpretation. Does the Soviet side agree with the U.S. side's interpretation put forward on May 5, 1971?

On April 13, 1972, the Soviet Delegation said there is a general common understanding on this matter.

D. Standing Consultative Commission

Ambassador Smith made the following statement on May 22, 1972:

> The United States proposes that the sides agree that, with regard to initial implementation of the ABM Treaty's Article XIII on the Standing Consultative Commission (SCC) and of the consultation Articles to the Interim Agreement on offensive arms and the Accidents Agreement,[1] agreement establishing the SCC will be worked out early in the follow-on SALT negotiations; until that is completed, the following arrangements will prevail: when SALT is in session, any consultation desired by either side under these Articles can be carried out by the two SALT Delegations; when SALT is not in session, *ad hoc* arrangements for any desired consultations under these Articles may be made through diplomatic channels.

Minister Semenov replied that, on an *ad referendum* basis, he could agree that the U.S. statement corresponded to the Soviet understanding.

E. Standstill

On May 6, 1972, Minister Semenov made the following statement:

> In an effort to accommodate the wishes of the U.S. side, the Soviet Delegation is prepared to proceed on the basis that the two sides will in fact observe the obligations of both the Interim Agreement and the ABM Treaty beginning from the date of signature of these two documents.

In reply, the U.S. Delegation made the following statement on May 20, 1972:

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[1] See Article 7 of Agreement to Reduce the Risk of Outbreak of Nuclear War Between the United States of America and the Union of Soviet Socialist Republics, signed Sept. 30, 1971.

The U.S. agrees in principle with the Soviet statement made on May 6 concerning observance of obligations beginning from date of signature but we would like to make clear our understanding that this means that, pending ratification and acceptance, neither side would take any action prohibited by the agreements after they had entered into force. This understanding would continue to apply in the absence of notification by either signatory of its intention not to proceed with ratification or approval.

The Soviet Delegation indicated agreement with the U.S. statement.

3. Unilateral Statements

The following noteworthy unilateral statements were made during the negotiations by the United States Delegation:

A. Withdrawal from the ABM Treaty

On May 9, 1972, Ambassador Smith made the following statement:

> The U.S. Delegation has stressed the importance the U.S. Government attaches to achieving agreement on more complete limitations on strategic offensive arms, following agreement on an ABM Treaty and on an Interim Agreement on certain measures with respect to the limitation of strategic offensive arms. The U.S. Delegation believes that an objective of the follow-on negotiations should be to constrain and reduce on a long-term basis threats to the survivability of our respective strategic retaliatory forces. The USSR Delegation has also indicated that the objectives of SALT would remain unfulfilled without the achievement of an agreement providing for more complete limitations on strategic offensive arms. Both sides recognize that the initial agreements would be steps toward the achievement of more complete limitations on strategic arms. If an agreement providing for more complete strategic offensive arms limitations were not achieved within five years, U.S. supreme interests could be jeopardized. Should that occur, it would constitute a basis for withdrawal from the ABM Treaty. The U.S. does not wish to see such a situation occur, nor do we believe that the USSR does. It is because we wish to prevent such a situation that we emphasize the importance the U.S. Government attaches to achievement of more complete limitations on strategic offensive arms. The U.S. Executive will inform the Congress, in connection with Congressional consideration of the ABM Treaty and the Interim Agreement, of this statement of the U.S. position.

B. Tested in ABM Mode

On April 7, 1972, the U.S. Delegation made the following statement:

> Article II of the Joint Text Draft uses the term "tested in an ABM mode," in defining ABM components, and Article VI includes certain obligations concerning such testing. We believe that the sides should have a common understanding of this phrase. First, we would note that the testing provisions of the ABM Treaty are intended to apply to testing which occurs after the date of signature of the Treaty, and not to any testing which may have occurred in the past. Next, we would amplify the remarks we have made on this subject during the previous Helsinki phase by setting forth the objectives which govern the U.S. view on the subject, namely, while prohibiting testing of non-ABM components for ABM purposes: not to prevent testing of ABM components, and not to prevent testing of non-ABM components for

non-ABM purposes. To clarify our interpretation of "tested in an ABM mode," we note that we would consider a launcher, missile or radar to be "tested in an ABM mode" if, for example, any of the following events occur: (1) a launcher is used to launch an ABM interceptor missile, (2) an interceptor missile is flight tested against a target vehicle which has a flight trajectory with characteristics of a strategic ballistic missile flight trajectory, or is flight tested in conjunction with the test of an ABM interceptor missile or an ABM radar at the same test range, or is flight tested to an altitude inconsistent with interception of targets against which air defenses are deployed, (3) a radar makes measurements on a cooperative target vehicle of the kind referred to in item (2) above during the reentry portion of its trajectory or makes measurements in conjunction with the test of an ABM interceptor missile or an ABM radar at the same test range. Radars used for purposes such as range safety or instrumentation would be exempt from application of these criteria.

C. No-Transfer Article of ABM Treaty

On April 18, 1972, the U.S. Delegation made the following statement:

In regard to this Article [IX], I have a brief and I believe self-explanatory statement to make. The U.S. side wishes to make clear that the provisions of this Article do not set a precedent for whatever provision may be considered for a Treaty on Limiting Strategic Offensive Arms. The question of transfer of strategic offensive arms is a far more complex issue, which may require a different solution.

D. No Increase in Defense of Early Warning Radars

On July 28, 1970, the U.S. Delegation made the following statement:

Since Hen House radars [Soviet ballistic missile early warning radars] can detect and track ballistic missile warheads at great distances, they have a significant ABM potential. Accordingly, the U.S. would regard any increase in the defenses of such radars by surface-to-air missiles as inconsistent with an agreement.

PREPARED STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Mr. President, I am today introducing a Resolution entitled the "ABM Treaty Interpretation Resolution," designed to provide the vehicle for the Senate to make a formal and forceful statement concerning the treaty power in general and the ABM Treaty in particular. Since October 1985, the Administration has, through its pronouncements concerning a new and so-called "broad" interpretation of the Treaty, moved slowly but inexorably toward a constitutional confrontation with the Senate. The time is nearing for the Senate to be heard.

Introduction of this resolution is timed to coincide with joint hearings conducted by the Judiciary and Foreign Relations Committees on its subject matter. These hearings have been designed to treat thoroughly the issues involved, and to establish a basis for action on the Resolution. The hearings will elicit testimony concerning the interpretation of the ABM Treaty as it was presented by the Executive branch in 1972, the interpretation as then understood by the Senate, and the constitutional imperatives which flow from the Senate having approved the Treaty on the basis of that interpretation.

The Treaty Power

Mr. President, earlier in this century the distinguished historian Edward Corwin formulated a classic description of the Constitution's dispensation of power as between the Executive and Legislative branches in the shaping of American foreign policy. Through the Constitution, Corwin said, the Founding Fathers extended to the two branches a permanent "invitation to struggle." In counterpoise against the President's role as Commander-in-Chief and his responsibility to conduct American diplomacy, the Framers established the power of Congress to legislate and, more specifically, to control national expenditures. This balance, and the ability of both branches to appeal directly to the American electorate, was a sure formula by which to limit the power of either branch and to guarantee a robust and continuing democratic competition between the two.

In one crucial area of foreign policy, the Constitution offered less an invitation to struggle than a clear delineation of role. According to Article II, section 2, clause 2, the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the

Senators present concur." The President was to be the Nation's treaty "maker" -- the negotiator and executor of international agreements. But he was to "make" only those treaties to which the Senate consented.

As with all aspects of constitutional practice, exercise of the treaty power has, from time to time, engendered dispute -- usually over policy, sometimes over the precise nature of the treaty power itself. One recurrent dispute has centered on the presidential tendency to by-pass the constitutional requirement of Legislative approval by undertaking so-called "executive agreements." In the making of a treaty itself, however, the roles and responsibilities of President and Senate have generally, over 200 years of constitutional history, reflected the clarity of the Constitution in this area.

The Assault on the ABM Treaty

In the fall of 1985, a profound question concerning this apparently clear delineation of power appeared on the constitutional horizon. High-ranking officals of this Administration announced that they had determined, after review of the Anti-Ballistic Missile Treaty of 1972, that it should be "reinterpreted." Their declared rationale was that certain Executive branch lawyers had found in still-secret portions of the Treaty's negotiating record the justification for a so-called "broader" interpretation, which would have the effect of assigning to the Treaty a drastically changed meaning.

Although audacious in its treatment of the treaty power, this development was far from surprising in the policy it implied. For several years, Executive branch officials, known for their opposition to the entire structure of superpower arms control erected by the past four Presidents, had questioned the merits of the ABM Treaty -- the very foundation of this structure. And in March 1983, the President had surprised the Nation with a speech outlining his vision for an astonishing and fundamental change in American nuclear strategy, which ran directly counter to the premises on which the ABM Treaty was based.

No longer, said the President, should American security in the nuclear age depend upon an energetic diplomacy backed by the capability to retaliate decisively against any attacker. No longer, he implied, should we need to buttress American security with superpower arms agreements designed to stabilize the nuclear balance. Rather, the President announced, he envisaged the construction of a complete anti-nuclear astrodome over the United States -- a "strategic peace shield."

The immediate consequence of this presidential vision was increased spending on technological research programs that the

President's aides quickly agglomerated under the appealing title, "Strategic Defense Initiative." But another consequence lay in wait. For an active pursuit of this dream meant not only the overturning of long-standing American strategy. It also required an assault on the foundations of that strategy, and paramount among these was the ABM Treaty. The President's Star Wars speech was indeed an implicit declaration of war on that Treaty.

Under Article I of the ABM Treaty, each party undertakes "not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense." The President's aim was directly contrary to this stated purpose, codified in treaty and law. His vision entailed spending heavily on the research, development, and testing of ABM systems, and then deploying such systems as soon as feasible. The Administration's "reinterpretation" of the ABM Treaty thus represented a direct and purposeful manifestation of the President's wish to transform American strategic policy.

One considerable obstacle, however, blocks the way of this unilateral Executive action: it is called the United States Constitution. Interpretation of the ABM Treaty, or any other, is not, constitutionally, subject to whim. In 1972, the ABM Treaty was formulated through the negotiation of a text of considerable clarity of meaning and purpose. Subsequently, representatives of the Executive branch presented the Treaty to the Senate with equal clarity, whereupon the Senate deliberated at length, reflecting through its questioning and debate an understanding of the Treaty consistent with the Executive presentation. And it was on that basis that the Senate, in the performance of its constitutional role, approved the Treaty's ratification -- enabling the Chief Executive to "make" the Treaty to which the Senate had consented.

During the 15 years since the ABM Treaty's entry into force, the United States and the Soviet Union have, in practice and with limited exceptions, abided by its terms as explained by the Executive and understood by the Senate in 1972. This "subsequent practice" has given to the Treaty's original and long-standing interpretation additional weight under international law. Accordingly, the situation today may be plainly stated. Unilateral Executive action to implement a new interpretation of the ABM Treaty would represent not only a cavalier arrogance toward international law but a direct challenge to the Constitution's delineation of the treaty power.

ABM Treaty Content: Clear Reflection of Clear Purpose

The extent of this challenge is underscored by a review of the Treaty's text, for its negotiators were operating upon clearly established premises and they proceeded to devise a text which accomplished their purpose. The essence of that purpose was to codify, and render permanent, a condition of mutual nuclear vulnerability between the superpowers. This was not an act of friendship, born of mutual trust. Rather, it represented, for each, a considered calculation of self-interest.

For both parties, the act of precluding a competition in strategic defensive systems constituted the only realistic means of preventing an uncontrolled race in offensive systems -- a spiraling proliferation of offensive, defensive, and still more offensive systems that would render each side both poorer and less secure. Further, the parties recognized that reductions of offensive systems could only be accomplished on the basis of strict limits on defensive systems.

The parties did, however, attribute value to a carefully limited use of defensive systems -- to protect fixed sites. They believed that the objective of enhancing nuclear stability would be served if each side was permitted to defend one grouping of ICBM silos, to help preserve a retaliatory capability in case the other struck first. And they believed, similarly, that stability would be strengthened if each side was permitted to defend its national capital, to help ensure against a "decapitating" first strike.

Because they recognized an inexorability in the advance of technology, and because they had identified two defensive functions that contributed favorably to nuclear stability, they did not seek to prohibit the improvement of all ABM-related technology. Indeed, the American side was optimistic that the development of lasers could eventually enhance the defensive functions which the Treaty was designed to permit. But the negotiators plainly did wish to constrain and channel technological development, in accord with their overall purpose of preventing a defensive-offensive race.

To prevent such a race, they realized, meant not only preventing the deployment of ABM systems, except for those two types explictly identified as useful. It also meant preventing the development and testing of systems with an inherent nation-wide capability up to a point of readiness to deploy. To allow such activity would defeat the purpose of the Treaty by rendering each side vulnerable to a "break out" -- a surprise, Treaty-violating deployment by the other.

With the aim of codifying this arrangement, the negotiators began the Treaty with an explicit obligation by each side "not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense." The remainder of the Treaty was designed to facilitate, permanently, the upholding of this mutual obligation.

The Treaty's definition of an ABM system was provided in Article II: "a system to counter strategic ballistic missiles or their elements in flight trajectory." And an essential prohibition was stated in Article V: "Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based."

With regard to those ABM systems permitted by the Treaty -- fixed, land-based systems to protect each side's national capital and a single grouping of ICBMs -- Article III provided detailed specifications as to precisely what was allowed, the purpose being to ensure that the permitted systems did not, on either side, expand into a "defense of the territory of its country," as prohibited by Article I.

To buttress this framework, the negotiators added a number of articles and agreed statements. One such statement, Agreed Statement D, took account of the technological advance which the two sides recognized as inevitable and which indeed the Treaty sanctioned as regards the development and testing of fixed, land-based systems. Agreed Statement D was intended, in its own language, "to insure the fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III." It stipulated that if "ABM systems based upon other physical principles and including components capable of substituting for [current ABM systems] are created in the future," the parties would consult and deploy only by means of an agreed amendment to the Treaty.

This provision, today subject to considerable controversy and distortion, is easily understood in light of the intent and purpose of the parties. They recognized that technology would advance, and they saw in laser technology particular promise for enhancement of the ABM functions they deemed stabilizing: the protection of fixed points on each side's national territory. But not knowing exactly what form a system "based upon other physical principles" might take, and wishing to protect the framework they were establishing, they pledged to consult and agree before incorporating such technology even into defensive functions permitted by the Treaty. Far from inviting technology to erode the Treaty's goals, they aimed to limit technology to serving the Treaty's goals.

ABM Treaty Ratification: Unanimity of Understanding

Having negotiated these arrangements, the Executive branch transmitted the Treaty to the Senate in June 1972, accompanied by the SALT I Interim Agreement on Strategic Offensive Arms. The extensive hearings and debate which ensued were marked by a considerable diversity of view on U.S.-Soviet relations and arms control. Many Senators -- for example, Senators Fulbright and Aiken of the Foreign Relations Committee -- supported the accords as negotiated. Others, led by Senators Jackson and Allott, were concerned about certain disparities, which they regarded as inequitable, in the negotiated limits on offensive systems. Some, including Senator Kennedy, argued that the effort -- sanctioned by the ABM Treaty -- to erect a defense of the national capital represented the wasteful pursuit of an impossible goal. Two others -- Senators Buckley and Allen -- opposed the ABM Treaty as an immoral foreclosure of all hope ever to erect an anti-nuclear national defense.

Throughout these proceedings, however, one thread was unbroken. The Executive branch presented the ABM Treaty, and the Senate understood the ABM Treaty, as an accord that would codify, permanently, a mutual U.S.-Soviet obligation "not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based." This obligation was central to the Treaty's fundamental purpose -- not to deploy or provide a basis for a nation-wide defense.

Two examples from these proceedings illustrate the clarity of this understanding. First, Secretary of Defense Laird, in a written response to a question from Senator Goldwater of the Armed Services Committee concerning "development of a boost-phase intercept capability or lasers," replied:

> There is . . . a prohibition on the development, testing, or deployment of ABM systems which are space-based, as well as sea-based, air-based, or mobile land-based. The U.S. side understands this prohibition not to apply to basic and advanced research and exploratory development of technology which could be associated with such systems, or their components.
>
> There are no restrictions on the development of lasers for fixed, land-based ABM systems.

Second, Senator Thurmond, in the Senate floor debate, expressed reservations about the ABM Treaty precisely because it "effectively prevents us from ever having the means to protect our population from a Soviet first strike . . . It also prevents us from developing new kinds of systems to protect our population. The most promising type appears to be the laser type, based on entirely new principles. Yet we forgo forever the ability to protect our people." Equally explict statements were made, in opposition to the Treaty, by Senators Buckley and Allen.

The "Reinterpretation": An Exercise in Distortion and Illogic

President Reagan's Star Wars speech of March 1983 represented a revival, more than 10 years after the ABM Treaty's ratification, of the notion that we could and should "protect our people" from a Soviet nuclear attack. Most strategists continued to believe that the best means of protecting the American people consisted in preserving the ABM Treaty and continuing the effort to constrain and reduce offensive systems in a stable balance. And most scientists continued to doubt that either superpower could actually erect an effective population defense, particularly in view of the proliferation of offensive weapons and countermeasures against defensive systems that such an effort would almost inevitably induce on the part of the other superpower. The specter of such a futile competition had indeed been invoked by American leaders in their successful effort to persuade the Soviet Union to negotiate the ABM Treaty in the first place.

Nonetheless, the President's fascination with a "strategic space shield," and his unbounded confidence that technology could somehow cure the condition of nuclear vulnerability, soon produced a Strategic Defense Initiative with considerable momentum. In part, this thrust came from innocent hope, in part from the self-interest of those who saw profit in an enormous Pentagon program, and in part from the ideological conviction of those who viewed the SDI as an alternative to the existing structure of superpower arms agreements which they had never trusted or approved.

In 1985, the Administration's self-imposed dilemma -- of trying to develop a population defense while pretending to honor an ABM Treaty expressly designed to prevent such a development -- was delivered, as many such problems are, into the hands of lawyers, in this case the lawyers of the State Department. But their task was considerable, and their effort to accomplish it through a tortured "reinterpretation" of the Treaty has run afoul not only of the Constitution but of the practical requirement that the "reinterpretation" possess the appeal of at least some internal logic. It does not.

The so-called "reinterpretation" is built upon an unpersuasive argument, atop which is constructed an edifice of illogic. Article II of the Treaty, having defined an ABM system functionally, as "a system to counter strategic ballistic missiles or their elements in flight trajectory," proceeded to note that such systems "currently" consist of ABM interceptor missiles, ABM launchers, and ABM radars. This was appropriate and indeed necessary because, for example, Article III of the Treaty stipulates limits on the missiles, launchers, and radars at the permitted ABM sites.

The "reinterpretation" builds its unpersuasive base by arguing that the negotiators, in defining an ABM system, were not _illustrating_ their functional definition by reference to existing systems but rather _limiting_ their definition to existing systems. And on this argument -- so totally inconsistent with the Treaty's express intent of permanently preventing either side from deploying ABM systems for a territorial defense or even of creating the base for such a defense -- the edifice of "reinterpretation" is built. Since future systems, embodying new technology, are not captured in the dubiously limited definition of an ABM system, such systems -- it is asserted -- are not subject to the Article V prohibition against the development, testing, and deployment of mobile systems. Accordingly, the argument goes, the body of the Treaty constrains future systems in only one way -- through the Article III provision specifying that at fixed sites the parties may deploy only existing systems.

The implausibility of the negotiators having had any such intent cannot be overemphasized, particularly when it is remembered the parties deemed effective ABM systems at two fixed sites to be stabilizing and all other ABM systems to be destabilizing. Yet, according to the "reinterpretation," they negotiated the body of a Treaty that would have allowed the deployment of futuristic ABM systems systems in all mobile modes, while constraining the deployment of future technology in the one area -- fixed sites -- where they anticipated that more effective systems could enhance stability.

According to the "reinterpretation," only by appending to the body of the Treaty the language of Agreed Statement D, under which the parties pledged to deploy future systems only by agreement, did the negotiators manage to place future systems under any constraint at all. Thus does the "reinterpretation" purport to take an auxiliary understanding -- designed to reaffirm the parties' intent to develop future fixed-point systems but not to deploy them except by agreement -- and turn it into the most significant provision in the "reinterpreted" Treaty.

Is it conceivable that, in the early 1970's, a team of distinguished and highly intelligent American public servants, laboring for two years to enhance this Nation's military security, would produce an ABM Treaty text which entirely contradicts its express purpose and which is salvaged, and then only partially, by a statement appended to the Treaty text?

The implicit accusation that this occurred, and that this failure went unnoticed for 13 years, insults not only the negotiators of the Treaty and the Senate of that period, but also those expected to be duped by this sophistry today. Those involved in the creation of the ABM Treaty, who now associate themselves with the "reinterpretation," apparently have a chameleon-like capacity for conformity with political fashion.

The "Reinterpretation" Applied: Illogic Compounded

According to the absurd logic of the so-called "reinterpretation," the negotiators created a treaty of unlimited duration without attempting to regulate significant developments in the future, and they sought to prevent either side from providing a base for a territorial defense without prohibiting the development and full-scale testing of space-based systems with an inherent nation-wide capability.

But equally defiant of logic is the Administration's apparent hope to apply the "reinterpretation" so as to justify a forthcoming ABM test in space. The "reinterpretation" is based entirely on the argument that somehow ABM systems based on "other physical principles" escaped the Treaty's prohibition against the testing of space-based and other mobile systems. Yet the ABM system which the Administration reportedly wishes to test -- in order to break through the traditional Treaty interpretation -- is a so-called "kinetic kill" weapon that relies on a rocket for propulsion and a "kill" mechanism no more futuristic than the rock David hurled at Goliath.

Such a system, similar to one tested by the United States before the ABM Treaty went into effect, can hardly be described as based on physical principles not known at the time the Treaty was ratified. To test a system of that description now would thus violate not only the traditional interpretation, which prohibits all space-based testing, but also the so-called "broad" interpretation, which purports to allow space-based tests of systems based on new physical principles. The Administration's rush to violate the ABM Treaty is clearly not born on a tide of persuasive logic.

Consequences of the "Reinterpretation"

Were the Administration to apply its "reinterpretation" and thereby undercut the ABM Treaty, the predictable consequences are numerous and severe:

-- Comprehensive Arms Control Precluded. First, application of the "reinterpretation" would destroy any lingering chance of achieving a comprehensive arms control agreement during this Administration, and perhaps for far longer. At Reykjavik, the opportunity to achieve an historic agreement to reduce strategic offensive forces was missed principally because the President insisted on maintaining the right to pursue his "strategic peace shield" under the "reinterpretation." Actual testing in violation of the ABM Treaty would doom current talks on strategic arms.

As to intermediate-range missiles, it is certainly possible that a deal might still be cut, but only because the Soviets can perceive a direct benefit from an arrangement that ratchets U.S. missiles out of Europe and helps to "decouple" the Atlantic Alliance -- all in exchange for Soviet dismantlements that reduce only marginally the Soviet capability to threaten Western

Europe. With that as an aim, the Kremlin might well proceed on an INF deal regardless of events on the strategic front. But a sound strategic deal can be based only a reaffirmed ABM Treaty.

-- Defeats Goal of ABM Treaty. Application of the "reinterpretation" would, at the same time, defeat the fundamental goal of the ABM Treaty, as set out in Article I -- "not to deploy ABM systems and not to provide a base for such a defense." Allowing full-scale engineering development and testing of space-based futuristic ABM systems and components would eliminate the Treaty's crucial protection from a possible "break out."

-- Accelerate Soviet Research. Meanwhile, sanctioning Soviet development and testing of mobile, futuristic ABM systems would dramatically increase the likelihood of a Soviet effort to build a nationwide defense and "break out" of the ABM Treaty. Given the extent of the existing Soviet ABM research and development program, unleashing a Soviet effort of this kind would be foolhardy and would seriously threaten U.S. national security.

-- Proliferation of Offenses. Sanctioning efforts by both sides to accelerate their strategic defensive programs will result in an escalating arms competition in both offensive and defensive systems. Secretary Weinberger, in a memorandum to the President, insisted that "Even a probable [Soviet] territorial defense would require us to increase the number of our offensive forces and their ability to penetrate Soviet defenses to assure that our operational plans could be executed." The Soviet Union would undoubtedly respond similarly.

-- Weakens the Atlantic Alliance. Action to undercut the ABM Treaty would be vehemently opposed by our NATO allies as a drastic shift in the Alliance approach to collective security. Since the Administration's original "reinterpretation" announcement in October 1985, the allies -- among them Chancellor Kohl of West Germany and Prime Minister Thatcher of Great Britain -- have expressed intense concern that the ABM Treaty be upheld. Rejecting their pleas would exacerbate existing doubts about American leadership of the Alliance.

-- Weakens the Fabric of International Law. Treaties are not only the law of this land; they also represent a solemn engagement between nations, binding in international law. To a significant extent, world stability depends on a regime of good faith compliance with that law -- a regime the creation and maintenance of which owes much to past American leadership. That inherently fragile regime would be seriously weakened by perceptions of a calculated American distortion of an international obligation long and widely perceived as crucial to world peace.

-- Constitutional Confrontation. Finally, action to implement the "reinterpretation" without formal acceptance by the Senate would provoke a constitutional crisis. The clarity of the ABM Treaty text, as explained by the Executive branch in 1972 and as understood by the Senate in consenting to ratification, leaves the Executive no latitude for the adoption of a changed interpretation, particularly one so drastic as has been promulgated. For the Executive branch to act on its "reinterpretation" would represent a severe challenge to the Constitution's delineation of the treaty power.

The Imperative of a Strong Senate Response

In the event of such a challenge, the Senate would face the question of recourse. One technique -- that of legislating compliance with the Treaty's correct interpretation -- could be effective on a policy level but would fail to meet the constitutional issue head-on. On the other hand, to bring the issue to resolution in the courts -- to render the question "justiciable" -- could be complex and time-consuming. It is therefore important, both to avoid court action if possible and to provide a basis for such action if necessary, that the Senate speak clearly and forcefully at an early point. Passage of the "ABM Treaty Interpretation Resolution" would provide that statement.

While the text of the Resolution is self-explanatory, one aspect within it warrants emphasis. In recent weeks public attention has been focused on the significance of the negotiating record -- inevitably, since the Administration cited that record in justifying the "reinterpretation" and then proceeded to deny Senate requests for access to the record. The general impression thereby created was that the negotiating record held a decisive significance as to the proper interpretation of this Treaty.

To accept that proposition, however, was to take a bite of the Administration's apple. For as eminent constitutional scholars have affirmed and as the Resolution expressly states, "during the period in which a treaty is in force, the meaning of that treaty is what the Senate understands the treaty to mean when it gives its advice and consent, a meaning which is informed by reference to expressions of intent by the Senate as well as Senate acquiescence in any interpretation communicated to the Senate." And, to the extent such meaning is clear, "anything not transmitted to the Senate, including the negotiating record, is not relevant to the meaning of the treaty."

In the case of the ABM Treaty, there can be little doubt that the harmony of the Treaty text, the presentation of the Executive branch in 1972, and the clearly evident interpretation of the Senate as a whole leaves no latitude at all for the kind of "reinterpretation" the Administration, with its lawyers, has conceived. The negotiating record -- while conceivably a relevant reference on minor, technical issues -- cannot in any way be determinative of proper interpretation of the ABM Treaty on the major questions the Administration's actions have brought to issue. In the absence of a formal Treaty amendment, which would require the formal consent of the Senate, those questions have been decided unalterably.

Conclusion: A Profound Strategic and Constitutional Issue

Mr. President, what is at issue here is decidedly not a lawyers' quarrel. We are witnessing a major assault on the premises and structure of a national nuclear strategy which a decade ago was supported overwhelmingly by the Senate, which on Monday of this week was reaffirmed by six former Secretaries of Defense, but which has been brought to issue by this Administration. We are also witnessing a subtle but equally significant assault on the Constitution's allocation of the treaty power.

My colleagues in the Senate may disagree on the wisdom of continuing the national strategy embodied in the ABM Treaty, although my expectation is that a substantial majority remains convinced that a reaffirmed ABM Treaty, without which comprehensive nuclear arms limitation will be impossible, offers the most reliable means of protecting this Nation in the years ahead. Where I hope all of my colleagues could agree, however, is on the imperative of upholding the constitutional responsibilties of the Senate, as reposed in this body by the Founding Fathers. Justice Felix Frankfurter stated this:

> The accretion of dangerous power does not come in a day. It does come, however, slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

The Senate's duty with the regard to the issue of ABM "reinterpretation" is, I believe, clear. The resolution I now introduce offers a means to begin the performance of that duty. I ask that its text be printed at this point in the Record.

Opening Statement
by
Senator Joseph R. Biden, Jr.

Joint Hearings
of the
Senate Judiciary and Foreign Relations Committees
on
the "Reinterpretation" of the ABM Treaty
March 11, 1987

Senator Pell and I agreed on the need for joint hearings on the ABM Treaty because, since 1985, the Administration has, through its so-called "broad" interpretation of the Treaty, moved slowly but inexorably toward a constitutional confrontation with the Senate. The time has come for the Senate to be heard.

Coincident with these hearings, I am today introducing the "ABM Treaty Interpretation Resolution," designed to provide a vehicle for the Senate to make a formal and forceful statement concerning the treaty power in general and the ABM Treaty in particular. Copies of that resolution and an accompanying floor statement are available.

These hearings will treat thoroughly the issues involved and will, I believe, establish a basis for action on the Resolution. We will elicit testimony in three phases, on three basic questions:

First, what did President Nixon's negotiators agree to with the Soviets in the ABM Treaty, but even more important what interpretation of that Treaty did they present to the Senate?

Second, what did the Senate believe it was agreeing to, on behalf of the American people, in consenting to ratification?

Third, can a President proceed to reinterpret the Treaty so as to implement a program -- in this case Star Wars -- in complete contravention of the clear understanding of the Executive branch and the Senate in 1972?

The hearings will, I believe, confirm that the Treaty text, the interpretation of the Treaty as presented by the Executive branch -- and the meaning as understood by the Senate -- were harmonious. They will, I believe, establish further that, during the life of the Treaty, the Constitution permits that interpretation -- and only that interpretation -- unless the Treaty is formally amended with the advice and consent of the Senate.

In recent weeks public attention has focused on the significance of the Treaty's negotiating record. This was inevitable, since the Administration cited that record in justifying its so-called "reinterpretation" and then proceeded to deny Senate requests for access to the record. The impression created was that the negotiating record held a decisive significance as to the proper interpretation of this Treaty.

To accept that proposition, however, was to take a bite of the Administration's apple. For as the Resolution states -- and as I believe this hearing will underscore -- when the meaning of a treaty is otherwise clear, "anything not transmitted to the Senate [during its consideration of a treaty], including the negotiating record, is not relevant to the meaning of the treaty."

A treaty is a contract, and where there is a meeting of the minds the agreement is binding. It was binding on President Nixon, who signed it, and everyone of his successors, including President Reagan. We cannot change the rules in the middle of the game simply by ordering lawyers in the State Department to find some loophole as if they were high-paid counsel to some tycoon who wants to welch on a bad deal.

Besides, the ABM Treaty was not a bad deal. It was not a suicide pact. It was carefully calculated means of protecting our national security by preventing a spiraling competition in nuclear weapons -- and of providing the foundation for reductions in those weapons. Without a reaffirmed ABM Treaty, there will be no reductions in strategic nuclear weapons.

In 1985, the Administration's self-imposed dilemma -- of trying to implement its Star Wars plans while pretending to honor an ABM Treaty expressly designed to prevent precisely that -- was delivered into the hands of lawyers. They were told to find a loophole, and clearly they have labored mightily to serve their clients. But their efforts have produced an argument that is neither constitutionally nor logically persuasive.

Is it conceivable that, in the early 1970's, a team of distinguished and highly intelligent American public servants, laboring for two years to enhance this Nation's military security, would produce an ABM Treaty so illogical in construction and so useless in attaining its express goals, as the Administration and its lawyers now allege? The accusation that this failure occurred, and that it somehow went unnoticed for 13 years, insults not only the negotiators of the Treaty and the Senate of that period, but also those expected to be duped by this sophistry today. Those involved in the creation of the ABM Treaty, who now associate themselves with the "reinterpretation," apparently have a chameleon-like capacity for conformity with political fashion.

Efforts to implement the so-called "reinterpretation" would constitute a direct challenge to the Constitution's delineation of the treaty power. In the event of such a challenge, the Senate would face the question of recourse. One technique -- that of legislating compliance with the Treaty's correct interpretation -- could be effective on a policy level but would fail to meet the constitutional issue head-on. On the other hand, to bring the issue to resolution in the courts -- to render the question "justiciable" -- could be complex and time-consuming.

It is therefore important, both to avoid court action if possible and to provide a basis for such action if necessary, that the Senate speak clearly and forcefully at an early point. Passage of the "ABM Treaty Interpretation Resolution" would provide that statement.

What is at issue here is decidedly not a lawyers' quarrel. We are witnessing a major assault on the premises and structure of a national nuclear strategy which a decade ago was supported overwhelmingly by the Senate, which was reaffirmed only two days ago by six former Secretaries of Defense, but which has been brought to issue by this Administration. We are also witnessing a subtle but equally significant assault on the Constitution's allocation of the treaty power.

My colleagues in the Senate may disagree on the wisdom of continuing the national strategy embodied in the ABM Treaty, although I believe that a substantial majority remain convinced that a reaffirmed ABM Treaty offers the most reliable means of protecting this Nation in the years ahead. Where I hope all of my colleagues could agree, however, is on the imperative of upholding the constitutional responsibilties of the Senate, as reposed in this body by the Founding Fathers. That is our subject today.

Chairman Pell and I invite differing points of view on all three questions we will discuss today. In that regard, the Committees will continue these hearings on March 26, at which time Administration spokespersons will appear.

Opening Statement
by
Senator Joseph R. Biden, Jr.

Second Joint Foreign Relations-Judiciary Committee Hearing
on
the "Reinterpretation" of the ABM Treaty
March 26, 1987

Two weeks ago, the Foreign Relations and Judiciary Committees of the Senate began joint hearings of immense significance. The Administration's so-called "reinterpretation" of the ABM Treaty poses not simply a technical issue for lawyers, but an issue of historic proportions -- a watershed decision -- with regard both to the American Constitution and to American strategic policy. Will we, in this 200th year of our Constitution's history, knowingly ignore its clearly delineated imperatives regarding the making and implementation of treaties? And will we, in pursuit of a naive presidential dream, abandon a strategic policy which, with broad bipartisan support, has been the bedrock of American national security throughout the crucial years of the nuclear age?

As our first joint hearing underscored, never before in American constitutional history has a President sought unilaterally to revise so fundamentally the meaning of a treaty. I wish therefore to enter a considered plea to my colleagues that, in considering S. Res. 167, they view the constitutional issues as paramount. Policy questions of strategic defense and continued adherence to the ABM Treaty can and should be resolved in the Congress in accordance with our constitutional procedures, not in direct violation of them.

In asserting the preeminence of the constitutional issue, I have no wish to feign neutrality on the strategic dimension. For fifteen years, the Anti-Ballistic Missile Treaty has been the cornerstone of nuclear arms control. Ratified with near-unanimous Senate approval, the Treaty expresses a recognition by the superpowers that the effort to build nation-wide defenses would not only prove economically wasteful and strategically futile, but would in all likelihood diminish nuclear stability and thus expose both nations to sharply increased nuclear risk.

The principal -- and I think adequately persuasive -- arguments against the President's idea of erecting a full-scale population defense are that it won't work and that efforts in that direction, in violation of the ABM Treaty, will erect nothing other than an obstacle to negotiated reductions in strategic offensive systems. Strategic offensive limits and reductions simply cannot be negotiated in the absence of collateral limits on defensive systems. This reality was forcefully asserted earlier this month in a bipartisan statement signed by three former Democratic Secretaries of Defense and three former Republican Secretaries of Defense, affirming their support of the ABM Treaty's traditional interpretation.

In sum, the President's dream represents the enormously expensive pursuit of an extremely implausible goal that, even if partially achieved, would endanger the American people -- a poor basis for overturning a national security policy to which this nation committed itself by treaty fifteen years ago, and which has been supported on a bipartisan basis.

Sadly, the Adminstration's pursuit of this dream has given birth to a so-called "reinterpretation" of the ABM Treaty which is both unpersuasive in its historical justification and unconstitutional in its legal grounding. The first of these joint hearings -- which clearly affirmed the validity and constitutional value of S. Res. 167 -- demonstrated this amply. As a result, I am confident that any effort to proceed with SDI activity in violation of the Treaty's ban on the development and testing of space-based ABM systems would produce an intense constitutional struggle in which the Administration would be the loser.

But this is not simply a petty turf dispute between two branches of government. What is at issue is the obligation of the President and the Senate together to adhere to the imperatives of the American Constitution -- specificially, its delineation of the treaty power.

The Constitution creates a syllogism. The text of the ABM Treaty expresses a total and permanent -- not a partial and transitory -- ban on the development and testing of mobile and space-based ABM systems and components. The Senate understood that meaning in consenting to ratification, and on that basis the Treaty was ratified. It is thus that interpretation which must govern the ABM Treaty's implementation; it is that interpretation which constitutes the supreme law of this land; and it is that interpretation which the President and the Senate have a solemn constitutional obligation to uphold.

In fashioning their bizarre interpretation of the ABM Treaty and of the Constitution, the architects of the "reinterpretation" relied heavily on an entity called "the negotiating record," which in reality comprises no more than an amalgam -- of indeterminate size -- of translators' notes, memcons, and internal memoranda stored in, or perhaps lost by, different offices and different agencies. At the time of the Treaty's ratification, no "negotiating record" was even assembled. Indeed, as the Administration is now demonstrating through its futile quest for ever more documents, the "negotiating record" is whatever the Administration can find in a file cabinet to help prove its point. Yet, for the "reinterpreters," even this selective approach has proven unavailing.

As two of this Nation's preeminent constitutional scholars so clearly underscored before us -- and as S. Res. 167 affirms -- when the meaning of a treaty is clear from the text, the ratification record, and the subsequent practice of the parties, the "negotiating record" has no interpretive significance. It was thus profoundly discouraging to hear the Secretary of State declare recently on national television that what counts in treaty interpretation is not what is said to the Senate but only what is said to the Soviets. That is wrong -- flagrantly wrong.

Reflect on the implications of this revolutionary departure from treaty law. Suppose a President were to enter into a secret side agreement with another party that severely jeopardized U.S. national security. Suppose, for example, that in the current INF talks, our negotiators secretly permitted the Soviets to convert their SS-20 missiles into intercontinental-range SS-16s. Or suppose that U.S. negotiators of the Panama Canal Treaties secretly agreed that Panama could, at any time, for any reason, close the Canal to American shipping. Would those who now assert the preeminence of the negotiating record seriously contend that those side agreements should control, even though the Senate knew nothing of them when they were made?

Another red herring easily disposed of is the specter that we could somehow, through strict fealty to the Constitution, find ourselves bound to one interpretation of a treaty while the other party was bound to another, more lenient interpretation. But the ABM Treaty represents no such instance. By all evidence, the United States entered into the Treaty under the same interpretation as did the Soviet Union, and in performance thus far neither party has deviated from that interpretation. What is at issue is a purposeful act of revisionist distortion undertaken by certain Administration officials in an effort to pursue the development of defensive systems in direct violation of the Treaty's express intent and thus to destroy the Treaty as the foundation of nuclear arms control.

In this grossly negligent -- or willful and deliberate -- act of disinformation, the President's advisers have served him no better on strategic nuclear policy than they did in the debacle of the Iran affair. They have capitalized on the President's infatuation with the notion of a strategic astrodome, and while the President gazed at the stars they have walked him down the garden path.

Just as in the Iran affair, they have grossly exaggerated the benefits of their dubious policy. Indisputably, the United States needs a solid program of research on defensive technology, both to hedge against and deter Soviet "breakout" from the ABM Treaty and to investigate the possibility of limited defensive deployments that might -- as envisaged by the ABM Treaty -- enhance nuclear stability. But as even Administration officials have repeatedly acknowleged, such research can be adequately conducted within the ABM Treaty's limits for many years to come. Ironically, the only test now contemplated that would violate the Treaty's traditional interpretation -- the test of a space-based kinetic-kill system -- would also violate the so-called "broad" interpretation because it relies on a traditional rocket for propulsion and a kill mechanism no more futuristic than the rock David hurled at Goliath.

And, just as in the Iran affair, the architects of the "reinterpretation" have grossly underestimated its costs. Implementation of the "reinterpretation" would block agreement on strategic offensive systems and induce a proliferation rather than a reduction of such systems. It would sanction an accelerated Soviet defense program -- also directly contrary to American security interests. It would weaken the Atlantic Alliance, by further intensifying allied doubts about American leadership. It would, through flagrant disregard, weaken the fabric of international law. And it would, by directly challenging the Constitution's delineation of the treaty power, lead inexorably to a divisive and debilitating constitutional struggle.

Let me welcome our witnesses here this morning by stating this: The only act more consitutitonally ignominious than promulgating the "reinterpretation" would be for the Senate to accept it.

Judge Sofaer, Secretary Perle, we are pleased to have you here.

Opening Statement
by
Senator Joseph R. Biden, Jr.

Third Joint Foreign Relations-Judiciary Committee Hearing on the "Reinterpretation" of the ABM Treaty
April 29, 1987

Today marks the third in a series of joint hearings conducted by the Foreign Relations and Judiciary Committees on the Administration's so-called "reinterpretation" of the ABM Treaty, which emerged suddenly and surprisingly in October of 1985.

Although the Administration has not yet acted to violate the ABM Treaty, its continuing assertion that it has the legal right to do so on the basis of this "reinterpretation" poses not simply a technical dispute for lawyers, but an issue of historic proportions with regard both to the American Constitution and to American strategic policy.

Will we, in our Constitution's bicentennial year, knowingly ignore its clearly delineated imperatives regarding the making and implementation of treaties? And will we, in pursuit of the naive presidential pipedream known as Star Wars, abandon a bipartisan strategic policy which has been the bedrock of American national security throughout the crucial years of the nuclear age?

Our initial joint hearing underscored three propositions clearly and emphatically:

-- First, testimony from the Treaty's negotiators underscored that there was no ambiguity emanating either from the Treaty text or from the negotiation itself. In 1972, the United

States and the Soviet Union clearly created a contract not to develop, test, or deploy mobile or space-based ABM systems -- in perpetuity.

-- Second, testimony from then-Foreign Relations Committee chairman Fulbright underscored what Senator Nunn recently affirmed in his own detailed analysis of the ratification proceeding. In 1972, the Senate acted to approve ratification of the ABM Treaty on the basis of a clear understanding of the Treaty's content and purpose -- an understanding entirely consistent with that of the negotiators.

-- Third, testimony from two of this nation's truly preeminent constitutional authorities -- Professors Louis Henkin of Columbia and Laurence Tribe of Harvard -- underscored the Constitution's clear imperative that the ABM Treaty, like any other treaty, be interpreted in a manner consistent with -- and only in a manner consistent with -- the understanding of the Senate when it consented to ratification.

To provide the Senate a vehicle for affirming these propositions, I consulted with a number of constitutional scholars while drafting S. Res. 167 -- the "ABM Treaty Interpretation Resolution" now pending before the Foreign Relations Committee. I urge Senators, as they consider this Resolution, to do so in isolation from their views on SDI, arms control, or U.S.-Soviet relations. First and foremost, this resolution is about the Constitution. For never before in American constitutional history has a President sought to revise, unilaterally and fundamentally, the meaning of a treaty.

In our second joint hearing, State Department Legal Adviser Sofaer sought to justify this action by proferring a novel theory of treaty-making. According to Judge Sofaer, "When [the Senate] gives its advice and consent to a treaty, it is to the treaty that was made, irrespective of the explanations [the Senate] is provided [by the Executive]." In other words, a treaty means what the President and the foreign power privately agreed that it meant at the time it was negotiated; the treaty's text and the Senate's understanding of what it was approving are irrelevant, even if the President may have withheld crucial records or otherwise deliberately misled the Senate.

While one must be impressed by Judge Sofaer's audacity in propounding this theory, it defies not only the Constitution but all reason. The Sofaer theory, if adopted, would not only vitiate the Senate's constitutional role in treaty-making. It would also severely damage the American presidency by undermining the President's ability to negotiate treaties in the expectation that he could gain Senate consent.

Consider the practical realities. Were the Senate to be guided by Judge Sofaer's theory that only its formal conditions on a treaty have interpretive meaning, the Senate would inevitably be led to redraft every significant treaty, or else attach to treaties such a multiplicity of conditions that their subsequent ratification by the parties would become well-nigh impossible.

Such dangers, I trust, do not lie in wait. For clearly, as a matter of constitutional law, the Legal Adviser's theory is wrong. His statement that "When [the Senate] gives its advice and consent to a treaty, it is to the treaty that was made..." presupposes that the President unilaterally makes treaties with foreign nations which the Senate is then asked to ratify. But the Constitution provides otherwise. The President has the power to "make Treaties" only "by and with the Advice and Consent of the Senate...provided two-thirds of the Senators present concur." No treaty is "made" until the Senate has given its consent, thereby permitting the President to ratify the treaty. By this means -- and only by this means -- a treaty becomes part of "the supreme Law of the Land."

What the Legal Adviser argues -- that superpower treaties are made by the President and the Soviets -- is tantamount to saying that President Nixon made the ABM Treaty the supreme law of the United States with the advice and consent of the Soviet Union. Obviously, that is not the case.

The ABM Treaty that became the supreme law of the land in 1972 was the Treaty to which the Senate gave its consent. To allow an Administration 15 years later to a confer upon that Treaty a different meaning would be to allow that the Executive may make treaties without the advice and consent of the Senate -- which is unconstitutional.

In a written response to a Time magazine account of his testimony before us, Judge Sofaer complained that Time had distorted his views. We asked Judge Sofaer to render his views on S. Res. 167, which focuses on the requirements of the Constitution. And certainly, in his testimony, that was what Judge Sofaer gave every indication of doing. Yet, in his letter to *Time*, Judge Sofaer complained that, when he asserted to these Committees the irrelevance of what the President tells the Senate during ratification proceedings, he was referring only to the international legal dimensions of treaty-making.

One might easily draw the conclusion that Judge Sofaer has a severe case of repudiation-itis. First, in Feburary, after Senators Levin and Nunn had revealed his legal work as severely flawed, Judge Sofaer repudiated an analyis on which he had relied for months, blaming "young lawyers" on his staff. Now, in his letter to *Time*, Judge Sofaer has repudiated the essence of his testimony to these Committees, claiming that he was not really addressing himself to the prime issue at hand -- the requirements of the Constitution as they relate to the interpretation of this Treaty -- but only to international law.

In this ABM debate, as Judge Sofaer shifts from one position to another, and discards one argument after another, he reminds one of the cross-eyed javelin thrower. You never know where he's going to come down, but he certainly keeps everyone's attention.

But even Judge Sofaer's latest ploy -- the assertion that the alleged irrelevance of the Senate pertains only to international law -- is unpersuasive. Judge Sofaer voices concern that adoption of S. Res. 167 would make the traditional interpretation of the

ABM Treaty binding only on the United States, and not the Soviet Union. But this concern is wholly and extremely hypothetical. The Senate is not trying to impose on the United States an obligation in excess of that accepted by both the United States and the Soviet Union in 1972, nor an obligation to which the Soviet Union does not deem itself bound today. S. Res. 167 would do no more than assert that any pursuit of the SDI based upon the so-called "reinterpretation" would constitute a clear and intentional breach of a treaty to which the United States has committed itself in full accord with international law.

Judge Sofaer also purports to find S. Res. 167 unworkable because it presupposes that nations take cognizance of the governmental activities of other nations. How, he asks, can we expect the Soviet Union to be aware of the ratification process in the U.S. Government? But surely this alleged concern is the weakest of reeds. With the Soviets having shown ample ability to learn even what the Administration does not wish them to learn, it is hardly too much to expect that they will be aware of the *public* deliberations of the Senate on matters of direct interest to them. Indeed, no one can truly doubt that the Soviets come to the negotiating table well aware that any treaty they would make with the United States must satisfy the Senate as well as the Executive, and that these two institutions *together* determine the making of treaties under our Constitution.

In the final analysis, Judge Sofaer's assumption of Soviet stupidity is as persuasive as his assertion that the President can constitutionally make treaties which have a meaning that the Senate does not know.

As regards the Administration's refusal to allow Mr. Graham and Mr. NcNeill to appear, one need only ask, Why would the Administration want to block the testimony of the General Counsel of ACDA? The answer lies in a recent Memorandum written by Judge Sofaer to Secretary Shultz. (Hold up memo.) In this Memo, Sofaer essentially denounces the ACDA General Counsel for his heretical views on this matter. What are these views? According to Sofaer's Memo, "ACDA General Counsel has previously taken positions on the Treaty that have been rejected by the Administration, particularly that the language is clear on its face, and that the negotiating record establishes the narrow view."

And what about the Assistant General Counsel in the Defense Department? According to press reports, in October 1985 -- when Judge Sofaer was conducting his "reinterpretation" analysis-- the DOD General Counsel's office prepared a study of the negotiating record that also supported the traditional interpretation. Could it be that Mr. McNeill, as Assistant General Counsel for international and intelligence affairs, was responsible for that study?

Obviously, the Administration is suppressing the views of those who disagree with Judge Sofaer's conclusions and seeking to prevent a fair and open debate in the United States Senate on this crucial issue. To deal with these tactics, the Committees may wish to use subpoena power so that the Senate can receive an objective airing of views. For now, however, the absence of these witnesses may provide even more eloquent testimony on this issue than their actual appearance.

Ms. Chayes, perhaps you would begin.

MARKUP OF S. RES. 167
Statement by Senator Joseph R. Biden, Jr.
May 19, 1987

Mr. Chairman, I wish to express appreciation to you for having agreed to act jointly with the Judiciary Committee in the conduct of hearings on S. Res. 167. As important as the ABM Treaty is to arms control -- and I think that importance cannot be exaggerated -- the Administration's efforts to distort the Treaty, years after ratification, raise equally important questions about its regard for the imperatives of the United States Constitution. Our joint hearings have been particularly useful in examining the constitutional dimension of the "reinterpretation" issue.

By the way, you mentioned the ABM Treaty negotiators. Considering that Ambassador Nitze supported the traditiontal interpretation for 13 and a half out of the 15 years since the Treaty was presented to the Senate, I wonder if it wouldn't be fair to say that, on a time-weighted basis, the traditional interpretation has been supported by 8.9 out of 9 negotiators.

As we begin markup today, I wish to make certain minor modifications in the Resolution. These are not new, in that they were in the version which the Committee considered as a part of the Foreign Relations Authorization -- before I agreed with you and Senator Helms that we would consider the Resolution as a separate entity. To make these changes official, I ask unanimous consent that they be incorporated now in S. Res. 167.

As the Committee acts on S. Res. 167, I think it useful to reflect on just why this issue has arisen. It is not, as you reemphasized, a lawyers' quarrel. The "reinterpretation" issue did not originate because a group of legal analysts looked objectively at the ABM Treaty, and decided that the United States had duped itself and the entire world for 13 years. The issue arose because the Administration has embraced the President's Star Wars fantasy, and its officials have devised a sophistical means to pursue that fantasy which they believe is more politically acceptable than withdrawing from the ABM Treaty.

Let me reiterate the point. The ABM Treaty is the foundation-block of nuclear arms control; Star Wars proponents wish to violate it -- essentially, to welch on the ABM Treaty -- without incurring the political consequences.

Senator Helms expressed this reality succintly during testimony from Professor Louis Henkin, chief reporter of the most recent Restatement of Foreign Relations Law and generally considered this nation's leading legal authority in this area. In arguing that a President lacks authority to unilaterally "reinterpret" a treaty, Professor Henkin pointed out that one valid option for a President, if he wished no longer to be bound by the ABM Treaty, would be to invoke its six-month withdrawal clause. Senator Helms intervened to say this:

> "Excuse me, sir. Then there would be another select committee on both sides of the Congress condemining the President, bashing the President, saying that he is a war monger and all the rest of it."
>
> To which Professor Henkin replied: "Perhaps, sir, and so be it," thereby revealing a concern for the fortunes of the Constitution over those of any particular President -- a concern which I hope is not peculiar to constitutional scholars.

The constitutional invalidity of the so-called "reinterpretation" is, I strongly believe, quite sufficient to make the case against it. But the Administration's policy -- of denigrating the Constitution in order to serve Star Wars -- becomes truly ironic when one recognizes the profoundly self-defeating quality of such a strategy. Let me cite some ironies:

-- First, Star Wars is perceived by many as an alternative to arms control. Yet no defensive system, even under the most implausibly optimistic hypothesis, could have any strategic value without corollary constraints on offensive systems -- meaning arms control.

-- Second, the President has portrayed his plan of erecting an anti-nuclear astrodome as stabilizing. Yet, by their very nature, space-based anti-missile systems, even if feasible, would be even more easily targeted against each other than against enemy missiles. Thus, the consequences of mutual deployment of such systems would be to increase first-strike temptations -- and thus nuclear instability.

-- Third, proponents of the "reinterpretation" allege that the Senate should not act to uphold the ABM Treaty because we are at a crucial point in arms talks. But it is the height of irony and illogic, not to say hypocrisy, to rationalize dismantlement of the most important control agreement in existence on the grounds that this might somehow enhance prospects for a marginally significant deal on INF.

Let us be clear. When this Administration came to office, there existed two key strategic agreements -- on offensive and defensive systems. Last fall, the Administration moved unilaterally to violate the numerical SALT II sublimits on offensive systems. Now, on defensive systems, it is moving toward unilateral violation of the ABM Treaty's ban on the development of space-based ABMs. To allow talk of a possible INF agreement to be used to justify an assault on the ABM Treaty would be utter folly -- particularly when arms talks are now limited to the marginal area of INF precisely because of that assault.

-- Finally, it is truly ironic to hear proponents of the "reinterpretation" argue that the Senate should not act to uphold the ABM Treaty because to do so would constrain presidential flexibility in foreign policy. For the theory of treaty-making they defend -- the "Sofaer theory" -- is so contemptuous of tradition, of common sense, and of the constitutional role of the Senate as to virtually ensure that all treaties negotiated by Presidents in the future would be subject to an increased and perhaps debilitating Senate scrutiny. What other response could be expected to a treaty-making theory that says the Senate cannot trust what the words of a treaty appear to mean or what the Executive branch says they mean?

In closing, Mr. Chairman, I ask my colleagues to consider this hypothesis. What if, in 1985, the Soviet Union -- not the United States -- had suddenly enunciated a "reinterpretation" of the ABM Treaty which was directly and flagrantly at odds with the text and with 13 years of established understanding and practice. I can postulate the answer easily and with confidence. All 100 Senators in this body would have denounced the Kremlin for engaging in a blatant act of fraud, and they would have been correct to do so. Moreover, we would have regarded such a deceit as so outrageous as to foreclose any prospect for engaging in further arms control negotiations with the Soviet Union, perhaps in our lifetime.

The "reinterpretation" is a fraud; and in the real case -- not the one I hypothesized -- it is a constitutional fraud perpetrated in pursuit of a strategic fantasy.

THE FOREIGN AFFAIRS ADVICE PRIVILEGE[*]

GORDON B. BALDWIN[†]

Post-Watergate attempts by the Congress to investigate and oversee the workings of the executive branch have generated disagreement concerning what information the executive branch must provide congressional investigators. An example is the recent confrontation between Secretary Kissinger and the House Select Committee on Intelligence. In this article Professor Baldwin discusses the unique disclosure problems within the Department of State and suggests that the Secretary has a qualified privilege to withhold certain foreign affairs information from the Congress. Professor Baldwin argues that a foreign affairs advice privilege is supported by the Constitution and is consistent with a long line of Supreme Court decisions.

Professor Henkin, in his authoritative 1972 book, *Foreign Affairs and the Constitution*, reports examples of Presidential claims to withhold foreign affairs information from Congress, and notes that, as a practical matter, Presidential claims have been honored:

> Congress has never sought to enforce its demands by threats of criminal sanction or citation for contempt against executive officials.[1]

On October 2, 1975, however, the House Select Committee on Intelligence, Otis Pike, chairman,[2] issued a subpoena to the Secretary of State demanding the production of a classified August 9, 1974 memorandum, authored by Foreign Service officer Thomas D. Boyatt, then director of Cypriot affairs in the Department of State.[3] The document related to the Cyprus crisis of 1974. It was captioned

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[*] This article was written while the author was serving temporarily in the Office of the Legal Adviser of the Department of State. The views expressed, however, represent only the opinion of the author and certainly not necessarily those of the Department of State.

[†] Professor of Law, University of Wisconsin, B.A., 1950, Haverford College; LL.B., 1953, Cornell University.

[1] L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 112 (1972).

[2] *See* Statement by Deputy Under Secretary Eagleburger, 73 DEP'T STATE BULL. 599, (Oct. 20, 1975). Washington Post, Oct. 16, 1975, at A14, col. 1.

[3] The subpoena, Secretary Kissinger's response, and the accommodation letter are reproduced in *Hearings before the House Select Committee on Intelligence*, 94th Cong., 1st Sess., pt. 2, at 911-21 (1976).

"Dissent Memorandum" and had been distributed within the so-called "Dissent Channel" of the Department of State.

On October 14, 1975, Secretary Kissinger replied in a lengthy letter.[4] He declined to produce the document, but offered alternatives. There the conflict stood until November 4, 1975, when an accommodation between the Secretary and a majority of the members of the Committee was reached. The Committee, by an 8-5 vote, (chairman Pike among the dissenters) accepted Secretary Kissinger's compromise offer in which he proposed to

> provide the Committee [with] an amalgamation of the State Department documents criticizing our Cyprus policy. This collection of material would include, interspersed among the other paragraphs and without any identification of authorship, the full contents of Mr. Boyatt's memorandum to me.[5]

The amalgamation was prepared by the Department of State and accepted by the Pike Committee, thereby averting a judicial test of their competing claims. Neither the Secretary nor the Pike Committee interpreted the law as requiring a compromise of their respective initial positions.

Because the Pike Committee's vote was close and the Secretary's position vigorously challenged, the existence of a "foreign affairs advice privilege" requires thorough consideration. This article addresses some of the legal issues involved in that confrontation and suggests that in these and similar circumstances the Secretary has a right to withhold information subpoenaed by Congress. The recognition of such a privilege is essential to workable government and will assist in preserving a competent and responsible Foreign Service. It will not unreasonably impede the legitimate investigative functions of the Congress.

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[4] 73 DEP'T STATE BULL. 645, (Nov. 3, 1975) contains the text. *See also* the Secretary's letter (Oct. 31, 1975) which led to the final compromise, 73 DEP'T STATE BULL. 748, (Nov. 24, 1975).

[5] 121 CONG. REC. H. 10698 (daily ed. Nov. 5, 1975). The Committee's understanding of the compromise is reported by Representative Aspin. *See also* 73 DEP'T STATE BULL. 750, (Nov. 24, 1975) for the text of Secretary Kissinger's letter of Nov. 3, 1975. Compromise arrangements such as this depend upon mutual trust and confidence that the agreement will be honored by both parties. Should a breach be threatened by a Congressional Committee, for example, it is possible that an action might be instituted in the federal courts to enjoin the public distribution of classified material. *See* Doe v. McMillan, 412 U.S. 306 (1973). In *Doe* the Supreme Court noted that there was "no absolute immunity" under the Speech or Debate Clause for legislative functionaries who distributed materials infringing upon the rights of individuals. A strong argument can be made, based on *Doe*, that where the dissemination of seriously damaging information supplied by the executive branch goes "beyond the reasonable requirements of the legislative function," distribution to the public can be enjoined. Of course first amendment values remain relevant.

I. BACKGROUND OF THE CONTROVERSY

A. The Select Committee

The Congressional investigative function involved in the Kissinger-Pike Committee confrontation was the primary duty of the House Select Committee on Intelligence. A select committee is unlike a standing committee in that its lifetime is limited by its particular charter, it lacks budget control over the agencies it investigates, and it does not maintain a continuing working relationship with the agencies it investigates. Indeed, because select committees are commonly formed for the purpose of investigating wrongdoing and mismanagement within the executive branch, it is not unusual for the relationship with the executive branch to be cautious, strained, and politically infected.

The Select Committee on Intelligence was formed by the House in the summer of 1975 to inquire into

> the organization, operations and oversight of the intelligence community of the U.S. Government. . . . [and is authorized to] require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents as it deems necessary.[6]

The Pike Committee's extensive investigations focused largely on the Central Intelligence Agency, whose Director, William Colby, was frequently applauded by the Congress for his willingness to testify and for his cooperation in supplying documents, many of which identified the authors by name. Hence, the Committee expressed discontent, and some members expressed anger, when Secretary Kissinger refused to supply a copy of the Boyatt memorandum in connection with the Committee's investigation of intelligence operations preceding the Cyprus crisis. Unlike the Senate Select Committee investigating the 1972 Presidential campaign, the Pike Committee was not authorized to seek judicial review of its powers directly. Instead, the Committee was left with the powers ordinarily enjoyed by congressional committees—the summary contempt power of Congress, and the sanctions of criminal contempt.[7] The former allows Congress to cite persons for contemptuous conduct and detain them until the person purges the contempt or the session is over; the latter requires the assistance of the courts, and imposes mandatory fines and imprisonment. It is an uncommonly clumsy and draconian remedy, frequently criticized, strictly construed in the Supreme Court, and its applicability to diplomatic affairs was denied by its principal draftsman, Congressman James L. Orr.[8] Customarily the committee's recommendation must be certified by the whole House to the United States Attorney for the District of Columbia, who is in turn responsible to the Attorney General. The matter must then be presented to a grand jury and an indictment sought. The legal ramifications of a prosecutor's refusal to sign such an indictment are presently unclear.[9] At best, the contempt remedy presents the Attorney General with the dilemma of deciding whether to represent the defendant, a colleague in the Cabinet, or the prosecutor. It is no wonder that the Congress does not lightly elect the criminal contempt route to test its authority over executive branch officials.

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[6] H.R. Res. 591, passed as amended July 17, 1975, 121 CONG. REC. H. 6976-92 (daily ed. July 17, 1975).

[7] R.S. 102, as amended 2 U.S.C. § 192 (1970). The basic statute was enacted in 1857 following the refusal of a New York Times reporter to testify concerning his reports of Congressional corruption. CONG. GLOBE, 34th Cong., 3d Sess. 403 (1857).

B. *The Secretary of State*

1. DISCLOSURE OF CONTENTS

The Boyatt memorandum was sent through the Department of State's "Dissent Channel," which was established several years ago upon the recommendations of task forces made up of career professionals from the Department of State, the Foreign Service and other foreign affairs agencies. It was designed to transmit new ideas to the Department's decisionmakers, to subject policy to the challenge of adversary review, and to encourage expression of dissenting views in reports. By 1972 specific channels of communication and distribution for dissent messages were established in regulations.[10]

The Boyatt Memorandum was exactly the type of memorandum which the "Dissent Channel" was designed to bring to the attention of the Secretary of State. It included an analysis of past official actions regarding Cyprus and expressed opinions regarding the motivation of foreign officials. Boyatt commented upon the judgment and recommendations of other officials in the Foreign Service and discussed policy choices open to the United States. Boyatt made strong recommendations concerning what policy the Secretary of State should adopt for future relations with Greece and Turkey and Cyprus.[11]

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[8] CONG. GLOBE, 34th Cong., 3d Sess. 431 (1857). *See also* Sky, *Judicial Review of Congressional Investigations: Is There an Alternative to Contempt?*, 31 GEO. WASH. L. REV. 399 (1962).

[9] Bringing a prosecution is exclusively an executive function. United States v. Cox, 342 F.2d 167 (5th Cir. 1964) *cert. denied*, 381 U.S. 935 (1965) (federal judge may not require the U.S. Attorney to sign an indictment) *cited in* United States v. Nixon, 418 U.S. 683, 693 (1974). *See also* United States v. Cowan, 524 F.2d 504 (1975).

[10] DIPLOMACY FOR THE 70's, Department of State Publication 8551, Task Forces VI and IX (1970). The writer of a dissent may indicate the distribution he or she prefers. The regulations require that the dissent go to the Secretary, the Director of the Planning and Coordination Staff, and the Executive Secretary of the Department. *See* 5 Foreign Affairs Manual, § 212,3c. For an historic dissent memorandum, distribution of which was forbidden but eventually published, see G. KENNAN, MEMOIRS: 1925-1950, at 480-82 (1967).

Documents and reports that contain information dealing with the leaders of foreign governments, or their actions or policies, present a potential for disrupting diplomatic relations.[12] Disclosure of sensitive information may not always be in the best interest of the United States, and expert evaluation of all relevant considerations is required. The Boyatt Memorandum contained sensitive information relating to foreign governments and thereby required the Secretary to weigh the probable effects of disclosure. Although the disclosure of information presented cause for concern, the compromise offer provided for confidential disclosure of the memorandum's substance in executive session. The effects of substantive disclosure will, of course, vary with the content of the material disclosed. In the Boyatt case the administration judged the effects to be acceptable; in other cases disclosure, even in confidence, might be unacceptable.

2. IDENTIFICATION OF THE AUTHOR

Even if the contents of a document can be disclosed without adverse effect, identification of the author may nevertheless be unwise. In the case of the Boyatt Memorandum one of the Secretary's primary concerns was created by his memory of the demands of the late Senator McCarthy, who on several occasions in the 1950's used congressional investigations to abuse Foreign Service officers who had expressed frank opinions in their official reports, and to charge that some middle-grade State Department employees were Communists.[13]

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[11] Thomas D. Boyatt is past President of the American Foreign Service Association. He is a graduate of Princeton and of the Fletcher School, and is presently serving as Deputy Chief of Mission in the American Embassy in Chile. His nomination to grade 2 of the Foreign Service was sent to the Senate in January 1976. Mr. Boyatt testified as follows: "I can respond in executive session in addressing classified information of an intelligence nature or any other nature; to questions pertaining to fact; anything dealing with reports I received or reports that I wrote; whether or not I made recommendations; to whom the recommendations were made; what instructions I received as an operating officer and from whom; and whether or not my recommendations, if any, were accepted. I cannot, however, discuss the substance of my recommendations nor am I permitted to respond if my opinions on the subject matter would deal with an area where I made a policy recommendation." *Hearings before the House Select Committee on Intelligence*, 94th Cong., 1st Sess. (pt. 2), at 771-72 (1975). The committee at this time heard extensive testimony from a former Ambassador to Cyprus.

[12] The United States has warned other nations of the risks of publicizing negotiating positions. *See, e.g.*, N.Y. Times, Sept. 23, 1975, at 8, col. 4, involving a message to Panama.

[13] On the damage inflicted upon Foreign Service officers see E.J. KAHN, JR., THE CHINA HANDS 212-85 (1975).

The damage done to the Foreign Service of the United States by the McCarthy claims left a legacy of bitterness only recently overcome. Although Secretary Kissinger specifically disclaimed any suggestion that the Select Committee sought to embarrass, exploit, or abuse junior and middle-grade officers, he believed that the demand for their work products should be resisted lest an adverse precedent be established. The major concern of the Secretary was not simply to protect the rights of the State Department's employees, but to protect the process by which advice and comment is tendered. Disclosure of the memorandum, he said, would prejudice the value of the dissent channel.

C. Compromise

The Secretary did not invoke a broad and undifferentiated claim to withhold information, and he specifically declined to describe his claim as involving "executive privilege," because that claim requires the specific approval of the President.[14] Nor did the Secretary claim that the intelligence information revealed in the Boyatt Memorandum was slight in comparison to its policy content. The Kissinger letter stressed the practical need for confidentiality in carrying out a foreign policy, and offered alternative means to allow the Committee to obtain information.

The Secretary's four concessions,[15] crystallized later in the compromise accepted by the Committee, reflect an understanding vital to workable government, namely, that the utmost effort is required to avoid uncompromising clashes of executive and legislative demands. Government will flourish only if the legislative and executive arms attempt to comply with each other's legal and political demands by demonstrations of forbearance, offers of compromise, and displays of conciliation. Recourse to the courts, moreover, is not a desirable means of adjusting differences. Courts rarely can act rapidly. They often lack information to sensitize them sufficiently to political conditions or personal differences that may infect a dispute, and the either/or, winner take all form of judgment may aggravate rather than ease tensions characteristic in the distribution of governmental power under the Constitution. However, compromise offers are not always successful, and the parties may finally resort to the courts. If they do, the fact that compromises have been offered helps demonstrate that broad claims of constitutional or statutory authority are not involved, and the courts may be better able to fashion remedies and write opinions without broad constitutional implications.

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[14] The President's role in the incident has not been disclosed, although both the Secretary and members of the committee conferred with him. *See* Washington Post, Sept. 27, 1975, at 1, col. 1. Of course, if Congress lacks power, under article I or other legislative authority, any witness has standing to object.

[15] The Secretary of State agreed to

> Authorize any officer of the Department or the Foreign Service, regardless of rank, to testify before the Select Committee on all facts known by that officer about the collection and use of intelligence information in foreign relations crises.
>
> Authorize any policy level officer of the Department or the Foreign Service to testify before the Select Committee on recommendations received by him from his subordinates, but without identification of authorship, and any recommendations he forwarded to his superiors.
>
> Supply the Committee with a summary from all sources, but without identification of authorship, of views and recommendations on the Cyprus crisis, and criticisms of our handling of it.
>
> Appear personally before the Committee to testify as to the policy of the United States with regard to the Cyprus crisis, as well as the policy of this Department with regard to the accountability of junior and middle-level officers for their views and recommendations.

73 DEP'T STATE BULL. 645, 646 (Nov. 3, 1975).

II. COMMON LAW SUPPORT

When the executive branch resists congressional demands for information, commentators tend to frame arguments solely in separation-of-power terms, thereby obscuring a preliminary consideration: an extant body of law justifies confidentiality on other grounds.

If a common law court finds a need for confidentiality to be such an essential attribute of an office or of a relationship that it overcomes the asserted interest in disclosure, then the information will be held privileged.

> [W]e should recognize that if there is a need for confidentiality, it is not necessarily based upon the doctrine of separation of powers found in our Constitution. That doctrine may condition or shape the exercise of confidentiality, but governments having no doctrine of separation of powers have an essential need for confidentiality, and the doctrine does not diminish the need.[16]

Within a broader area of governmental privilege the common law courts have recognized a foreign affairs privilege in ordinary litigation by applying a "state secret doctrine" forbidding the disclosure of certain evidence.[17]

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[16] Levi, *Confidentiality and Democratic Government*, 30 RECORD OF N.Y.C.B. ASSN' 323, 324 (1975).

[17]
> There are occasional precedents applying the testimonial privilege for secrets of state, the scope of which is limited to nondisclosure of matters relating to international relations, military affairs and public security, and the existence of which has never been doubted.

8 WIGMORE, EVIDENCE (McNaughton rev. 1961), § 2378, at 794. *See id.* at §§ 2367-79, particularly § 2378. *See also* MCCORMICK ON EVIDENCE § 107 (2d ed. 1972). For recent British decisions of great public interest see *Attorney General v. Johanathan Cape Ltd.; Attorney General v. Times Newspapers Ltd.*, Q.B., Oct. 1, 1975. The latter decision by Lord Widgery, Lord Chief Justice, was an action to enjoin the publication of the diaries of Richard Crossman, a member of the British Labor Cabinet, for the years 1964-1966. An injunction was refused because the Court found that the

None of the cases applying the state secret doctrine involve legislative demands for executive information, hence standing alone, these decisions are not precedent for rebuffing congressional demands. They are immediate authority only for withholding data from litigants, courts, and the public. However, the analytical framework of these decisions illustrates judicial evaluation of similar conflicts.

The common law, in determining whether or not a confidentiality claim should be honored, requires two inquiries: (a) Is confidentiality required in the relationship in issue; and (b) Is disclosure contrary to the public interest, and if not, does the public's interest in disclosure overcome the need for confidentiality in the particular circumstances presented.[18] The judicially sanctioned withholding of executive information based on a state secret doctrine illustrates three points. First, the courts defer to the opinion of executive departments on the need for confidentiality. Second, courts recognize the executive branch's responsibility for international relations. Third, courts confirm that public interest in confidentiality prevails despite the presumed relevance of the evidence to the court.

In *United States v. Nixon*,[19] the Supreme Court confirmed this nonconstitutional[20] ground by approving, without discussion, the ar-

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passage of time minimized the damage which disclosure might create. However, the Court specifically noted that more recent material might not be publishable. The decision is reported in the London Times, Oct. 2, 1975, at 8, col. 1. *See also* N.Y. Times, Oct. 2, 1975, at 1, col. 1; The Economist, Oct. 18, 1975, at 18, col. 1. Could the executive department forbid the public distribution of a judicial opinion on the grounds that it compromises state secrets? It is hard to envisage or easily justify the prospect, but the opinion in United States v. Haugen, 58 F. Supp. 436 (E.D. Wash. 1944) contains material about the Hanford plutonium project that was, or should have been at the time, highly classified.

[18] *See* McCormick on Evidence, § 107 (2d ed. 1972). Of lesser importance in the Congress' interest are two additional purposes of confidentiality: (1) Protecting associative rights. Privacy claims of groups of individuals associated in a common venture are honored where those associations could not effectively function without that protection. In NAACP v. Alabama, 357 U.S. 449 (1958), the Supreme Court noted that public scrutiny would risk reprisals, loss of work, threats, and public hostility. Hence, "confidentiality was indispensable to its very existence." Similar protection might properly be afforded to members of the Foreign Service whose careers might be influenced improperly if their reports were widely distributed. (2) Protecting valuable business data. Courts and legislatures may afford protection of valuable business secrets and forbid their misappropriation by competitors. Levi, *Confidentiality and Democratic Government*, 30 Record of N.Y.C.B. Ass'n 323, 325 (1975). *See* Kewanne Oil Co. v. Bicron Corp., 416 U.S. 470 (1973). Economic interests justify affording protection, which would justify withholding data on oil reserves, production, distribution and alternative supplies.

[19] 418 U.S. 683 (1974).

[20] The doctrine is nonconstitutional in that it does not rely upon the separation-of-powers doctrine, nor is it unique to our government. *See* note 16 *supra*. Of course to the extent the doctrine is based on the sovereignty of the United States it is constitutional since the federal government can act only as the Constitution empowers it. *See* United States v. Nixon, 418 U.S. 683, 705-06 n.16 (1974).

gument that some confidentiality is a requisite of effective government:

> The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion.[21]

It would have been helpful had the Court fully explained why the need for confidentiality was "too plain" to require discussion. Common law courts have generally explained that confidentiality of communications is so important in fostering some relationships that the public interest favors nondisclosure.[22] When a confidentiality privilege is denied, as in *Branzburg v. Hayes*,[23] the Court stresses the absence of facts establishing a need for the privilege. Facts can also support denial of a privilege, or the existence of a qualified privilege, or, as in a recent case involving the Nixon papers, the very limited intrusion upon confidentiality that a disclosure might require.[24]

In a nonconstitutional context the scope of the state secret claim is limited by its underlying purpose.[25] Similarly, the scope of the foreign affairs advice privilege should be shaped by its purposes. These include both protecting private interests of individuals and fostering the public interest in a workable government.

Confidentiality helps in protecting the safety, dignity, and privacy of individuals. "One reason for confidentiality," states Attorney General Levi, "is that some information secured by government if widely disseminated would violate the rights of individuals to privacy."[26] Diplomatic reports may contain forthright comments about the personal qualities of foreign service colleagues or members of other agencies, the reports may identify a foreign leader who does not wish to be identified as an informant, and they may refer to the character and motives of foreign leaders. It would be embarrassing, and damaging, to the individuals as well as to foreign relations if such comments were made public. In a delicate diplomatic situation such as that with Greece, Turkey, and Cyprus, the degree of potential damage from disclosure is so great that dissemination must be strictly limited.[27]

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[21] United States v. Nixon, 418 U.S. 683, 705 (1974).

[22] *See generally* Environmental Protection Agency v. Mink, 410 U.S. 73 (1973); Totten v. United States, 92 U.S. 105 (1875); King v. United States, 112 F. 988 (5th Cir. 1902); United States v. Burr, 25 F. Cas. 30 (No. 1469 2d) (C.C.D. Va. 1807).

[23] 408 U.S. 665 (1972). Justice Stewart, dissenting, notes the majority's reliance upon facts in saying "[W]e have never before demanded that First Amendment rights rest on elaborate empirical studies . . . ." *Id.* at 733.

[24] Nixon v. General Services Administration, No. 74-1852 (D.D.C., Jan. 7, 1976) (three-judge court upheld the constitutional validity of Title 1 of the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695, 44 U.S.C.A. § 2107 (Supp. 1976). The statute requires that ex-President Nixon's papers be preserved in custody where they may be examined by trained archivists. This intrusion was upheld by the three-judge court in view of the limited scope of its examination, the major public interest in the materials, and the limited intrusion on privacy and Presidential prerogatives. Appeal is likely.

[25]
> "[T]he scope of the privilege of the United States with respect to state secrets, like its similar privilege to withhold the identity of confidential informants 'is limited by its underlying purpose.' "

Halpern v. United States, 258 F.2d 36, 44 (2nd Cir. 1958).

[26] Levi, *Confidentiality and Democratic Government*, 30 Record of N.Y.C.B. Ass'n 323, 324 (1975).

Recognition that the need for confidentiality rests, in part, upon our status as a sovereign member of the international community[28] makes relevant the comparative practices of other nations as a measure of what degree of protection the law of the United States should give to foreign affairs advice. Since the United States must negotiate with foreign nations, it seems clear that at some point disclosure of information or advice would destroy our ability to act on equal or even effective terms with other countries. Doctrines inhibiting the ability of responsible leaders to receive candid advice must, therefore, be avoided.

In Great Britain, foreign affairs confidentiality is guarded by the very limited power of parliamentary committees (they lack inquisitorial power), by the parliamentary system, which allows Ministers to decline to answer questions, by the Cabinet system, and by the Official Secrets Act, described by a former British Foreign Secretary as "a fearsome enactment under which anyone who discloses State secrets can be severely punished by the courts."[29] These combine to give that government the authority it needs to protect sensitive data, including advice given by subordinates. The United States Government does not seek all these instruments, but it does require that modicum of confidentiality essential to select the wisest policies.

Confidentiality, then, has been justified by the courts as a means of protecting individuals and fostering the public interest in an effective foreign affairs capability.

III. STATUTORY AUTHORITY

Courts rarely hesitate to avoid constitutional rulings where other grounds are available. The statutory authority for maintaining confidentiality in the foreign affairs area is less than overpowering, but neither is it easily dismissed.

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[27] Although Boyatt was apparently personally willing to have his comments, however damaging, disclosed to the Congress, his superiors concluded that the views, and their sources, should remain confidential.

[28] *See* United States v. Nixon, 418 U.S. 683, 705-06 n.16 (1974).

[29] Walker, *Secrecy and Openness in Foreign Policy Decision Making*, in T. FRANCK & E. WEISBAND, SECRECY AND FOREIGN POLICY 43 (1974).

The Secretary of State can control the response to a request for information by relying on several statutes authorizing regulation of the behavior of State Department employees. If, for example, a Foreign Service officer is served with a subpoena, statutes and the Foreign Service regulations implementing them limit the right to obtain testimony by imposing internal review procedures:

> No response shall be made to any subpoena except upon the specific authorization of the Secretary, the Deputy Secretary, or the Deputy Under Secretary for Management after notification of the advice of the Legal Adviser, and for congressional subpoenas, the Assistant Secretary for Congressional Relations . . . .[30]

This regulation, and others in the multivolume Foreign Affairs Manual, receive their legislative support in several statutes authorizing the Secretary of State to manage the internal affairs of his department. The Foreign Service Act, for example, provides that the Secretary of State shall

> have authority to prescribe the regulations not inconsistent with the Constitution and the laws of the United States in relation to the duties, functions, and obligations of officers and employees of the Service and the administration of the [Foreign] Service.[31]

Additional authority, required because not all employees are members of the Foreign Service, is supplied by the statutes pertaining to general departmental administration.[32]

Coupled with this general authority is the specific authority to make rules with respect to information and material classified by the executive branch. The current bases for classification are Executive Order 11652 and its implementing regulations.[33] The legal foundation for this order, confirming the traditional classification categories and detailing classification procedures, is stated only generally as based upon the Constitution and statutes (uncited) of the United States.

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[30] 5 Foreign Affairs Manual 485 (1974).

[31] Foreign Service Act of 1946, § 302, 60 Stat. 999 (1946), *as amended* 22 U.S.C. § 811a (1970).

[32] 63 Stat. 111, *as amended,* 22 U.S.C. § 811a (1970) provides that the Secretary of State "shall administer, coordinate, and direct the Foreign Service of the United States and the personnel of the State Department. . . . [H]e may promulgate such rules and regulations as may be necessary to carry out the functions now or hereafter vested in the Secretary of State or the Department of State . . . ."

[33] Exec. Order No. 11652, 3 C.F.R. 339 (1976). For exhaustive studies of classification authority see *Security Classification Reform, Hearings on H.R. 12004 before a Subcommittee of the House Committee on Government Operations,* 93d Cong., 2d Sess. (1974); *Executive Classification of Information, Security Classification Problems Involving Exemption (b)(1) of Freedom of Information Act,* H.R. Rep. No. 221, 93d Cong., 1st Sess. (1973).

Thus, a clash of constitutional claims can be avoided by arguing that Congress, by supporting, tolerating, and authorizing internal rulemaking has forbidden one of its committees to gather information the committee deems relevant. Such a claim would be difficult to sustain given the mandate for oversight held by the Pike Committee, but it retains vitality in view of the limited authority Congress has previously exercised over the internal management of the Department of State, as compared to its more forceful role in asserting authority over other executive departments.[34] It is, of course, legally possible for the Congress to limit its own committees' rights of inquiry, as a recent opinion of the Attorney General suggests,[35] but it is also arguable in a given instance whether Congress has in fact spiked its own claim.

It is well established that in construing a statute the interpretation adopted by the administering agency is entitled to considerable weight.[36] Furthermore the courts are more likely to confirm agency interpretations if the statutory provisions to which they refer are subsequently reenacted by Congress without significant change.[37] It was not uncommon for the executive branch to refuse congressional requests for diplomatic information prior to the most recent revision of the statutes authorizing the Secretary to regulate the agency,[38] and, hence, it remains arguable that the administrative regulations limiting responsiveness to congressional requests have received sufficient acquiescence to restrict the Select Committee. The statutory argument, however tentative, receives further support if it is coupled with an interpretation of law giving a lesser role to Congress in the field of foreign relations.

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[34] *Compare* the acts of the First Congress establishing the several executive departments: Act of July 27, 1789, 1 Stat. 28, establishing the Department of Foreign Affairs; Act of Aug. 7, 1789, 1 Stat. 49, establishing the Department of War; *with* the more detailed regulations establishing the Treasury Department, Act of Sept. 2, 1784, 1 Stat. 65. *See also* the detailed provisions of the First Judiciary Act, Act of Sept. 24, 1789, 1 Stat. 73.

[35] Opinion of the Attorney General, Edward H. Levi, Sept. 4, 1975, concerning a subpoena of the House Interstate and Foreign Commerce Committee issued to the Secretary of Commerce; *contra*, statement by Professor Norman Dorsen, Oct. 21, 1975, before the Subcommittee on Oversight and Investigation of the House Committee on Interstate and Foreign Commerce.

[36] Northern Indiana Pub. Serv. Co. v. Porter County Chapter, Izaak Walton League, 95 S. Ct. 172 (1975); Udall v. Tallman, 380 U.S. 1, 16 (1965); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933).

[37] Zemel v. Rusk, 381 U.S. 1, 11-12 (1965).

[38] The major work giving examples on this subject will be published late in 1976 by Professor Sofaer of Columbia Law School. Earlier studies, well known to Congress, include Kramer & Marcuse, *Executive Privilege: A Study of the Period*

IV. Constitutional Basis

Lawyers and courts must master the relevant law regardless of whether it is statutory, regulatory, or common law. In the vast majority of cases those sources will resolve the issues, but few clashes between separate branches of the Federal Government can be resolved without confronting the constitutional separation of powers. Because the drafters of the Constitution declined affirmatively to vest exclusive control of foreign affairs in either the executive or the legislature, one must look beyond that document to discover evidence of the drafters' intentions applicable to a foreign affairs advice privilege. In the remainder of this section the discussion will focus upon basic political theory, comparisons between practices before and after the ratification of the Constitution, and early clashes between President Washington and the Congress.

A. Early Political Theory

Practical politics underlie the theory advanced here that in matters of foreign affairs the powers of Congress are more restricted than they are in domestic matters. The distinction was known to the Founding Fathers through the writings of John Locke, who more than any other philosopher influenced their thinking.[39] Locke, writing in the 17th century, distinguished between two types of executive power, each of which was subject, in a different degree, to legislative authority. Insofar as the legislative authority dealt with matters of domestic concern—that is, the relations that operate among the inhabitants represented—the executive's authority was limited, and subject to the representative authority. However, in foreign relations, the executive's capacity must be greater, and subject to less constraint from the legislative authority, because "the whole community is one body . . . in respect of all other states or persons out of its community."[40] The legislative power does not directly reach foreign subjects with whom a nation must deal. Within the commonwealth, each individual was a unit; for relations beyond the commonwealth the whole body politic was a single unit. Hence, Locke observed, the executive authority

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1953-1960, 29 Geo. Wash. L. Rev. 623, 827 (1961); Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 Fed. B.J. 103, 223, 319 (1949). *See also* R. Berger, Executive Privilege: A Constitutional Myth (1974). For more recent examples see Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 93d Cong., 2d Sess. Refusals by the Executive Branch to Provide Information to Congress 1964-1973, (Comm. Print 1974). The report consists of 571 pages.

[39] A. Schlesinger, The Imperial Presidency 8 (Houghton Mifflin ed. 1973).

[40] J. Locke, The Second Treatise of Civil Government 72-74 (Blackwell ed. Oxford 1946).

> is much less capable to be directed by antecedent, standing, positive laws . . . and so must necessarily be left to the prudence and wisdom of those whose hands it is in to be managed for the public good. . . . [W]hat is to be done in reference to foreigners, depending much upon their actions and the variation of designs and interests, must be left in great part to the prudence of those who have this power committed to them, to be managed by the best of their skill for the advantage of the commonwealth.[41]

However clear the distinction in fact, it is difficult to articulate in a Constitution. One participant at the Convention, Abraham Baldwin, later remarked that some foreign relations issues were deliberately left unsettled in the hope that they would be resolved "by practice or by amendments in the progress of the Government."[42] In fact the Constitution excludes the states from the area of foreign relations but it disperses foreign relations power between the executive and legislative branches. The independent role of each branch is uncertain in the text and frequently disputed in practice. The shifting balance between congressional and Presidential authority may be attributable more to the philosophy and personality of leaders, the political affiliations of the participants, and the issues of the moment than it is to authoritative doctrine.[43]

The balance shifts especially with the subject matter of the issues. When they involve military matters, defense alliances, weapons deployment, and defense contingency plans, the President's authority is buttressed by his exclusive power as "Commander-in-Chief" and the claims of Congress are diminished.[44] However, when

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[41] *Id.*

[42] 3 The Records of the Federal Convention of 1787, 370 (Max Farrand, ed., rev. ed. 1937).

[43] Justice Jackson noted the varying interpretations advanced by several Presidents and their advisers in his great concurring opinion in Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579, 634 (1952): "A Hamilton may be matched against a Madison . . . . Professor Taft is counterbalanced by Theodore Roosevelt. . . . It even seems that Taft cancels out Professor Taft." *Id.* at 635 n.1.

[44] *See* The Federalist Nos. 69, 74 (A. Hamilton). Most of the extensive literature and litigation on the Commander-in-Chief powers (the literature is more extensive than the litigation) is covered in E. Corwin, The President: Office and Powers 1787-1957 ch. VI (4th rev. ed. 1957). Presidents have accepted significant congressional limits on their power to exercise command. The Selective Service Act of 1940, for example, forbade sending inductees or reservists outside the western hemisphere. It took great effort to cull units of such men, but it was accomplished and the forces sent to Iceland and Greenland were all volunteers and included no draftees. *See* two official U.S. Army in World War II studies: M. Matloff & E. Snell, Strategic Planning for Coalition Warfare 1941-42 50, 111 (1953); Engleman & Fairchild, The Western Hemisphere: Guarding the U.S. and its Outposts 471, 477, 484, 486 (1964). Professors Henkin and Schlesinger are in error in reporting that the statute was violated by the President: L. Henkin, Foreign

> vice and consent of the senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest.[47]

Jay was among the early American leaders who believed that a major purpose of the Constitution was to take foreign relations responsibilities from the Congress and create a strong executive charged with that responsibility.[48] The Framers agreed that the foreign relations interests of the nation would be better served by a single executive chief than by a committee, or by Congress generally.[49] Indeed, Congress had already recognized this under the Articles of Confederation at the time the Department of Foreign Affairs was established.[50] Coupled with the single-voice principle[51] was the recognition of the need for confidentiality, and although the only reference to confidentiality in the Constitution pertains to the authority of Congress to keep secret records of its proceedings,[52] there is strong reason to assert that confidentiality of diplomatic and military discussions was assumed.[53]

B. *Practices under the Articles of Confederation and the Constitution*

The tradition of withholding foreign relations information from those not directly involved has deep roots in the United States history. In 1775 the Continental Congress appointed a 5-member Committee of Secret Correspondence to communicate with potential allies in Europe. Preconstitutional foreign relations activity is reported in "secret" journals of the Continental Congress, which reveal that great effort was expended in assuring that delicate foreign relations maneuvers were not disclosed to the public. Each member of Congress (there was no executive) swore to maintain confidentiality.[54] United States diplomacy was both aided by confidentiality and severely hampered by its breach.[55] In the preconstitutional era confidentiality was difficult to achieve, and on at least one occasion the Congress admonished one of its members for a breach.[56] Even under the Articles of Confederation the Continental Congress deemed it useful to allocate foreign affairs responsibility to a single person or to a smaller committee because of a felt need for decisive action and because exposure of diplomatic matters jeopardized negotiations.

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[47] THE FEDERALIST No. 64 (J. Jay) (emphasis added).

[48] In THE FEDERALIST No. 64 Jay writes:

> So often and so essentially have we heretofore suffered from the want of secrecy and dispatch, that the Constitution would have been inexcusably defective if no attention had been paid to those objects. Those matters which in negociations [*sic*] usually require the most secrecy and the most dispatch, are those preparatory and auxiliary measures which are no [*sic*] otherwise important in a national view. . . . For these the president will find no difficulty to provide, and should any circumstance occur which requires the advice and consent of the senate, he may at any time convene them.

[49] THE FEDERALIST No. 70 (A. Hamilton): "Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks. . . ." Hamilton cites colonial as well as Roman history for examples showing the failure of a multimembered executive authority.

[50] *See* note 58 *infra*.

[51] THE FEDERALIST Nos. 70, 74. Hamilton deals with the need for a single voice in military affairs. THE FEDERALIST No. 75: "the qualities . . . indispensable in the management of foreign negotiations, point out the executive as the most fit agent . . . ."

[52] U.S. CONST. art. 1, § 5.

[53] See THE FEDERALIST No. 64, *supra* note 48 for Jay's observation on the harm created by failures of secrecy under the Articles of Confederation.

> [The Continental] Congress itself, which had at first been the sole organ of government, accepted, under force of circumstances, the 'establishment' in response to Washington's appeal of January 29, 1781 . . . of 'executives or ministers in the departments of finance, war, the marine and foreign affairs.' The Constitution of the United States did not make this distribution of power. It would be more proper to say this distribution of power made the Constitution.[57]

The Continental Congress recognized that intelligence gathering was a fundamental function of the foreign relations department and directed the Secretary of Foreign Affairs to

> use means to obtain from the ministers and agents of the . . . United States in foreign countries, an abstract of their present state, their commerce, finances, naval and military strength, and the characters of sovereigns and ministers, and every other political information which may be useful to the United States.[58]

American diplomats made such reports from the beginning,[59] and after the Constitution, their reports were directed to the President. Under the Articles of Confederation diplomats were responsible to the Congress, which specifically reserved to itself full access to the records and papers of the Department of Foreign Affairs.[60] When the First Congress, in 1789, created a successor department as part of the executive branch, it provided that the new department would have the custody and charge of all records, books and papers of the old. However, the new office was made responsible to the President and the Secretary was directed "to conduct the business of said department in such manner as the President of the United States shall from time to time order and direct."[61] Under the new law there was no provision making the books and records open to members of Congress.[62]

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[54] 2 FOREIGN RELATIONS, SECRET JOURNALS OF THE ACTS AND PROCEEDINGS OF CONGRESS, 1775-1781 at 1, 31 (1820).

[55] *See* VAN DOREN, SECRET HISTORY OF THE AMERICAN REVOLUTION (1941).

[56] *See* 5 ANNALS OF CONG. 443. *See also* THE FEDERALIST No. 46 (J. Jay).

[57] 1 WHARTON, DIPLOMATIC CORRESPONDENCE OF THE AMERICAN REVOLUTION 662 (1889).

[58] The quotation is from the old law, cited in a footnote to the statute which replaced it, 1 Stat. 28.

[59] *See* note 57 *supra*.

[60] Act of 27 July 1789, 1 Stat. 28.

These comparisons of pre- and post-Constitution practices support the assertion of executive primacy in the area of foreign affairs information.

C. *President Washington and the Congress*

President Washington asserted his primary responsibility for foreign negotiations from the beginning of his term.[63] During 1792 and 1793 Gouverneur Morris was serving as Minister of the United States to the Republic of France. Normally diplomatic reports went directly to the Secretary of State, although some, such as Gouverneur Morris in France (partly because of a longstanding personal friendship), also wrote directly to President Washington. Morris' letters, both to Washington personally and to Secretary of State Edmund Randolph as a matter of his official duties, were full of extraordinarily lucid and frank detail.

The question of the right of the Senate to see Morris' reports to Secretary Randolph was raised in an incident, which is a strong precedent on the subject of Presidential-Congressional disputes. On January 17, 1794, the Senate, much distressed by the behavior of the French revolutionary government, considered a resolution that the "Secretary of State be directed" to submit to the Senate diplomatic correspondence from Gouverneur Morris addressed to the Secretary of State.[64] The resolution apparently was considered impolitic, if not unconstitutional, and it was amended to read "that the President of the United States be requested" (not directed) to give the Senate the diplomatic correspondence between the United States and France. It was passed on January 24 by a vote of 13-11.[65] A month later President Washington responded in a short note transmitting certain of the documents, but deleting all those written to him directly, and from the others, "particulars which in my judgment for public considerations, ought not to be communicated."[66] Contemporaneously, Washington transmitted complete copies of other diplomatic documents sometimes with, and sometimes without, injunctions of confidentiality.[67] All the correspondence, including the personal letters to Washington, was eventually published in 1832. The letters, parts of which were deleted when they were submitted to the Senate, contain very candid assessments of French politics, personalities, and military affairs, together with forthright opinions which would surely have been embarrassing, if not grounds for diplomatic protest.[68] The Senate did not protest either the President's decision to withhold data, or the confidentiality, although relations with revolutionary France were of great interest and were often discussed in the Congress.

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[61] Berger makes a contrary assertion in EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 199 (1974). He refuses to attribute to the First Congress an intention to surrender power. But a fundamental purpose of the Constitution was to create a single executive, because the inadequacies of the Articles of Confederation were plainer to statesmen then, than to some critics today. To read the Constitution as Berger does would be to return to the 1780's! *See* Winter's devastating book review of Berger's history in 83 YALE L.J. 1730 (1974).

[62] *See also* 31 U.S.C. § 107 (1970), authorizing the Secretary of State to certify that expenditures for intercourse or treaty with foreign nations shall not be specified, *and id.* § 54, exempting such expenditures from General Accounting Office examination.

[63] The first assertion of a privilege to withhold was Washington's initial refusal to submit material to the House of Representatives concerning the defeat of General St. Clair in November 1791. For this and two other instances of the invocation of an "executive privilege" see Sofaer, *Executive Privilege: An Historical Note*, 75 COLUM. L. REV. 1318 (1975). Professor Sofaer, director of the American Bar Association study of the war powers in American history, is established as a leading scholar on the subject.

[64] 4 ANNALS OF CONG. 38. The incident, which I rediscovered, was also found

The foregoing incident, though unreported until 1975,[69] is worthy of attention because scholars commonly cite the practices of our first President and of the first Congresses as constitutional authority. These men included many of the Constitution's draftsmen, and they knew their public acts would be regarded as precedents.

Two years later, in 1796, the House of Representatives did object, vigorously, when President Washington declined to provide them with copies of correspondence with John Jay relating to the 1794 Jay Treaty with Great Britain. The incident, frequently discussed as an important precedent, was of less value as a precedent for exclusive presidential authority than the Morris incident, but it generated far more discussion. Jay, a New Yorker of aristocratic demean-

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some months earlier by Professor Sofaer of Columbia Law School. Professor Sofaer's helpful discussion of the affair is now published in his article, *Executive Privilege: An Historical Note*, 75 COLUM. L. REV. 1318 (1975).

[65] 1 AMERICAN STATE PAPERS, FOREIGN RELATIONS, 329.

[66] 4 ANNALS OF CONG. 38.

[67] 1 AMERICAN STATE PAPERS, FOREIGN RELATIONS, 413.

[68] "French troops were extremely undisciplined;" French emigrants serving with France's opponents "would be more injurious to their friends than to their enemies." Anarchy "exists to a degree scarcely to be paralleled" and "the great mass of French population would consider even despotism as a blessing;" "there exists also a mortal enmity between different parties in the Assembly;" "the French nation" are like "cattle before a thunder storm." *Id.* at 329-30. Morris reveals himself to be no admirer of the French, and had his letters been revealed, he would probably have been expelled from France.

[69] The Morris incident was first reported in Sofaer, *Executive Privilege: An Historical Note*, 75 COLUM. L. REV. 1318 (1975).

or, was intensely disliked by the Jeffersonians in Congress, and the treaty he negotiated was disappointing to many Americans because no apparent attempt was made to resolve several outstanding issues between the countries including claims that Britain violated United States rights by seizing ships, sailors, and slaves, and by inciting Indian tribes to fight against settlers. Hence, opposition to the agreement was widespread and bitter.[70] President Washington claimed that he gave the Senate all pertinent material, instructions, and correspondence relating to the Treaty. The Senate debated the Treaty in closed session and this secrecy which allowed Senators to debate without public pressure may well have contributed to the Treaty's acceptance by the closest possible margin, 20 to 10.[71]

After the Senate's approval, the House considered the necessary appropriations and voiced even sharper disagreement with the treaty provisions. It was understood that the effectiveness of the engagements could be blocked by a decision not to appropriate funds. The followers of Thomas Jefferson were among the leading critics, who, unlike Jay and his supporters, generally favored a French, rather than a British, connection. Much of their venom was directed against John Jay personally. Jay not only supplied the occasion, but, through his authorship of a key *Federalist Paper*, he also supplied the intellectual grounds for frustrating the House.[72] Furthermore, Congress knew that part of Jay's prior success as a diplomat from 1782 to 1783 was achieved by ignoring both his instructions from Congress and a treaty of alliance with France.[73]

The House of Representatives, a majority of which doubtless believed that Jay had acted as independently of the President in this instance as he had of Congress a decade before, sought copies of his instructions. The House claim was buttressed by its need for information to fulfill its constitutional function of appropriating funds to implement the agreement. Practically, the members believed that no important secrets were involved since the President had already provided copies of the instructions to the Senate. Some members of the House had even seen them. Even so, the House request, adopted by a 62-37 vote, was qualified in that it specifically exempted "such papers . . . as any existing negotiations may render improper to be disclosed,"[74] thus demonstrating a sensitivity to the needs of diplomatic activity sometimes absent in more modern Congressional demands. Some who voted for the qualifying clause were motivated by doubts concerning their constitutional authority.[75] The House, however, rejected Madison's amendment that would have allowed the President to withhold papers which "in his judgment it may not be consistent with the interests of the United States at this time to disclose."[76]

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[70] The history is helpfully reported in Bailey, A Diplomatic History of the American People 77-80 (8th ed. 1969).

[71] Part of article 3, and articles 9 and 10 of the Jay Treaty remain effective today. Treaty of Amity, Commerce and Navigation with Britain, Nov. 19, 1794, arts. 3, 9, 10, 8 Stat. 116 (1846), T.S. No. 105.

[72] In The Federalist No. 64, Jay asserted the merit of relying upon the Senate for advice, rather than the House. Senators, he said, are by reason of their greater age and the method of selection, more likely to be "the most distinguished by their abilities and virtue," and the people are not "liable to be deceived by those brilliant appearances of genius and patriotism which, like transient meteors sometimes mislead as well as dazzle."

[73] Those charged with negotiating the treaty that ended the American Revolution were specifically instructed to consult with the French, as the alliance required, but in view of French machinations, Jay and his colleagues found it more expedient, and more in the new nation's interests, to act independently. Bailey, A Diplomatic History of the American People 42-48 (1969).

President Washington's reply was tailored to the request, moderate in its tone, polite in its message, but negative in its response. Washington rooted his reply in the Constitution, interpreting it as requiring him "to harmonize with the other branches."[77] The President explained the nature of foreign diplomatic relations and the limited role of the House of Representatives as follows:

> The nature of foreign negotiations requires caution; and their success must often depend on secrecy; and even, when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic: for this might have a pernicious influence on future negotiations; or produce immediate inconveniences, perhaps danger and mischief, in relation to other Powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making Treaties in the President with the advice and consent of the Senate; the principle on which the body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand, and to have, as a matter of course, all the papers respecting a negotiation with a foreign Power, would to establish a dangerous precedent.[78]

An extensive debate in the House followed, but no formal action was taken, and the necessary funds were appropriated. My reading of the debate leads me to conclude that most members of the House would have accepted, some grudgingly, a refusal to supply the information if its disclosure would have harmed the nation.[79]

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[74] 5 ANNALS OF CONG. 426, 759. The entire debate is reported in about 300 pages.

[75] *Id.* at 438.

[76] *Id.*

[77] *Id.* at 760; 1 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 194.

[78] 5 ANNALS OF CONG. 760.

[79] *See* 5 ANNALS OF CONG. 426-760. Professor Sofaer agrees; *see* Sofaer, *Executive Privilege: An Historical Note*, 75 COLUM. L. REV. 1318, 1319 (1975). Mr.

Washington's assertion of a right to withhold foreign affairs information, when coupled by the acquiescence of the Senate in the Morris dispute, and acquiescence of the House in the Jay dispute, provides formidable evidence that the intent of the Founding Fathers was to afford the executive branch a privilege against the disclosure of injurious foreign affairs information to Congress.[80] Furthermore, in the Morris affair, President Washington did not even consider relevant to the Senate's request various communications received from Ambassador Morris that Washington apparently believed to be entirely personal, despite their inclusion of important diplomatic messages.[81] Presidents from Washington to the present have, until recently, successfully maintained that papers and recordings of advice received from subordinates are personal and not public papers, and hence, not subject to the demands of Congress.[82]

Berger does not. R. Berger, Executive Privilege: A Constitutional Myth 174-79 (1974).

[80] Another early precedent to an executive claim of confidentiality is found in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The Attorney General, when the case was brought, refused to testify to anything relating to his official transactions. Chief Justice Marshall responded to this by stating that if he thought that anything was communicated to him in confidence he was not bound to disclose it. *Id.* at 143-45. Marshall's service as Secretary of State, and as a diplomatic representative in France, may have contributed background for this statement. Communication from junior Foreign Service officers may contain extremely sensitive intelligence information, as well as opinions as to diplomatic options. Such data are collectable by the President's agents and may properly be confidential as a necessary function of the President's powers as Commander-in-Chief, as well as his responsibility for foreign affairs.

[81] These letters were eventually published in 1 American State Papers, Foreign Relations, as supplements to the Ambassador's official papers.

[82] That Presidents and other high government officials have a personal property interest in their papers, correspondence, and other material accumulated in the course of their office is supported by several cases, although the Supreme Court has not ruled on the question. In 1861 a New York court recognized that Washington, in writing to his private and military secretary did not "part wholly with his property in the literary compositions nor give the receiver the power of publishing them." Eyre v. Higbee, 35 Bar. 502 (N.Y. Sup. Ct. 1861). A federal court has held that Admiral Rickover may copyright speeches and lectures written by him on matters not directly concerned with his employment. Public Affairs Associates v. Rickover, 284 F.2d 262 (D.C. Cir. 1960), *vacated* 369 U.S. 111 (1962), *decision on remand* 268 F. Supp. 444 (D.D.C. 1967). The power of a President to impose conditions on access to Presidential papers and materials is supported by Nichols v. United States, 460 F.2d 671 (10th Cir. 1972) which upheld the right of the Kennedy estate to donate materials to the National Archives subject to severe access restrictions. The distinction between private and public papers was litigated in United States v. First Trust Co., 251 F.2d 686 (8th Cir. 1958) wherein the court found that certain documents, mostly written by William Clark of the Lewis and Clark Expedition, were rough notes and, hence, were private papers rather than public documents. In Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975) the court held that President Nixon did not own 42 million papers and recordings "generated, created, produced or kept in the administration and performance of the powers and duties of the Office of the President . . . ." *Id.* at 145. *Compare* In re Roosevelt's Will, 190 Misc. 341, 73 N.Y.S.2d 821 (1947) revealing that President Roosevelt had made an effective gift of certain of his papers

V. THE DOCTRINE OF FUNCTIONAL NECESSITY

The foregoing dicussion has demonstrated the need for a foreign affairs advice privilege, and has presented both facts and policies pointing to a constitutional basis for the privilege. This section will demonstrate the compatibility of such a privilege with long-accepted legal concepts.

For almost a century and three-quarters the doctrine of functional necessity has been a decisive element in Supreme Court determinations delineating the extent of one branch's power vis-a-vis another's. Simply stated, the doctrine of functional necessity says that where the Constitution places certain responsibilities with a branch of government, then it also empowers that branch to take *reasonable* action (in the light of the prerogatives of the other branches) to meet its responsibility.

The doctrine has been applied to each of the three branches. In *Marbury v. Madison*[83] the Court concluded that, despite the absence of firm language in the Constitution, courts have authority to review the constitutionality of acts of Congress. The Constitution is the supreme law of the land and article III confers the judicial power and the obligation to decide cases upon the courts. Therefore, the courts must test any claim against the Constitution. If a court lacked that power, it could not effectively decide what the law is. The power, in other words, was necessary to fulfill the courts' function.

The doctrine applies similarly to Congress. The Congress possesses not only such powers as are expressly granted to it by the Constitution, but also such auxiliary powers as are necessary and appropriate to make the express powers effective. Therefore, when the Constitution confers the power to legislate upon the Congress it impliedly confers power to subpoena and to compel the attendance of witnesses necessary to furnish information needed for the efficient exercise of the legislative function.[84]

The doctrine of necessary and implied powers is not confined to the legislative and judicial branches. On the contrary, the Constitution confers upon the President all power reasonably incident to the

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to the Government! *See also* Porter County Chap. v. Atomic Energy Comm'n, 380 F. Supp. 630 (N.D. Ind. 1974) holding that a government employee's handwritten notes were not "agency records" within the meaning of the Freedom of Information Act.

[83] 5 U.S. (1 Cranch) 137 (1803). The defendant in *Marbury* was the Secretary of State. The opinion of Chief Justice Marshall, an ex-Secretary of State himself, refers to the duties of the Secretary which are "to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts." *Id.* at 380 (dictum).

[84] McGrain v. Dougherty, 273 U.S. 135, 175 (1927).

exercise of the executive function, and the power so granted in the Constitution cannot be abrogated by Congress or the States.[85] In the case of *In Re Neagle*[86] the Supreme Court upheld the President's power, without statutory authorization, to order a Deputy United States Marshal to protect a Supreme Court Justice. The Marshal had killed a prominent, if not notorious, Californian who was in the act of assaulting Supreme Court Justice Stephen J. Field in a railroad station dining room. In federal habeas corpus proceedings the Marshal claimed he was acting "in pursuance of a law of the United States," but no federal statute authorized his act, and California authorities argued, therefore, that both jurisdiction and the measure of criminal liability were supplied by State law alone. The Court rejected the State's claim by construing the President's article II power as including "a duty to enforce the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protections implied by the nature of the government under the Constitution."[87] That duty was to assure that a federal judge would be able to do his job. If force is reasonably necessary to further that end, the President may order it.

The authority of the President to gather secret intelligence was recognized by the Supreme Court as a function of his office in *Totten v. United States*,[88] involving a suit on a contract allegedly made by President Lincoln with a secret agent. Justice Field, for a unanimous Court, upheld the President's contractual authority by invoking the war powers.

> We have no difficulty as to the authority of the President in the matter. He was undoubtedly authorized during the war, as Commander-in-Chief of the Armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy; and contracts to compensate such agents are so far binding upon the Government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control.[89]

Furthermore, the Court upheld the President's authority to make secret agreements, and in dictum suggested that the power was not restricted to wartime operations:

> The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to

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[85] In re Neagle, 135 U.S. 1, 16 (1889).

[86] *Id.* The *Neagle* case supports orders to protect any U.S. agent and his immediate family, if necessary to enable them to fulfill their duties.

[87] *Id.*

[88] 92 U.S. 105 (1875).

[89] *Id.* at 106.

> be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, *or upon matters affecting our foreign relations*, where a disclosure of the service might compromise or embarrass our Government in its public duties, or endanger the person or injure the character of the agent.[90]

The executive branch's authority in gathering intelligence is further emphasized by the holding in *Totten* that the suit could not be brought in a court because it necessarily would breach the confidence necessary for the agreement:

> [S]uch services are sometimes indispensable to the government. . . . The publicity produced by [suing for payments] would itself be a breach of a contract of that kind, and thus defeat a recovery. . . . [P]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.[91]

The doctrine of functional necessity does not operate solely to confirm governmental powers but also to limit them. Courts have limited congressional inquiries where the infringement of a witness' first and fifth amendment claims was not justified by the specific legislative purpose. Furthermore, the limitations upon the power of Congress to investigate are not restricted to those supplied by the Bill of Rights.

In *Kilbourn v. Thompson*,[92] the House attempted to punish a citizen for contempt by reason of his refusal to testify. The Court held that the House's area of inquiry was not within its constitutional authority. It was merely directed to the private affairs of a citizen. Because the testimony was not required in a matter into which the House had jurisdiction to inquire, the House lacked power to punish the witness. The power to punish was not necessary in that instance because it did not further any legitimate function of Congress.

In discussing the investigative powers of Congress, the Supreme Court, speaking through Justice Harlan, has stated:

> The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.

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[90] *Id.*
[91] *Id.*
[92] 103 U.S. 168 (1880).

> Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government.[93]

Recently, in *Senate Select Committee v. Nixon*,[94] a federal court of appeals relied upon the test of functional necessity in a nonconstitutional ruling to dismiss the Ervin Committee's suit for enforcement of a subpoena duces tecum served on the President for production of tape recordings of conversations between the President and an aide. The Ervin Committee was unable to make a sufficient showing of need to overcome the "presumptive privilege attaching to Presidential conversations." The House Committee on the Judiciary, as part of its inquiry into Presidential impeachment, had copies of the subpoenaed tapes in its possession. Thus, Chief Judge Bazelon held the Select Committee's oversight need to be "merely cumulative." Any other needs of the Select Committee were held "too attenuated and too tangential to its functions" to require enforcement of the subpoena. The Congress in this case failed to establish its precise need, although there was no doubt that the information would have been interesting to the Committee.[95]

In *United States v. Nixon* the Court adverted to, but specifically did not decide, the question of the balance between "the confidentiality issue and Congressional demands for information."[96] Nor did the Court's holding deal with the President's interest in and responsibility for preserving state secrets.[97]

Raoul Berger has written and testified in support of the argument that judicial review of congressional subpoenas, investigations, and contempt citations is "limited to inquiry whether the particular investigation was within the jurisdiction of Congress and whether the demand for information was consistent with Bill of Rights guarantees."[98] Berger does not believe that either the separation-of-powers doctrine, or the common-law state-secret doctrine limit congressional inquiry. Berger's rigid denial of the separation-of-powers doctrine was not followed in *United States v. Nixon*. Indeed, neither his books nor his articles on the subject were cited or discussed by the Court. Berger, on his part, claims that the courts are wrong.

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[93] Barenblatt v. United States, 360 U.S. 109, 111-12 (1958). *See also* Eastland v. United Servicemen's Fund, 421 U.S. 491, 504 (1975).

[94] 498 F.2d 725 (D.C. Cir. 1974). The case is criticized in Berger, *Congressional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865 (1975).

[95] *See also* Gravel v. United States, 408 U.S. 606 (1972) where the Supreme Court limited the scope of the speech or debate clause to what is functionally necessary.

[96] 418 U.S. 863, 712 n.19 (1974).

[97] *Id.*

[98] Berger, *Congressional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865, 869 (1975). For another scholar's criticism of Berger, see Sofaer, Book Review, 88 HARV. L. REV. 181 (1974).

Central to Berger's books and articles is his belief that English parliamentary practice, in which Crown officers are fully answerable to the House of Commons, is an authoritative historical precedent. It is, of course, true that the Founding Fathers frequently compared the United States system with the British one, but they certainly did not intend to maintain under the Constitution the paralysis that the legislative supremacy of the Articles of Confederation created.[99] Furthermore, Berger's admiration for the British system fails to take account of the strong British party system where the Parliament only rarely refuses to support the government in power. Sharp questions more commonly come from members of the opposition, who ordinarily lack power to force any changes. In fact, historically the British parliamentary system supports a degree of secrecy far surpassing that existing, or sought, in this country. The British Cabinet, composed of members of Parliament, commonly declines to answer foreign affairs questions on the grounds that the information sought should not be disclosed.

Berger's book, *Executive Privilege: A Constitutional Myth*, as he admits, was written "in the context of Attorney General William Rogers' claim of absolute, 'uncontrolled' presidential discretion to withhold information from Congress and the courts . . . ."[100] He fails to consider claims of privilege more narrow in scope. Furthermore, historical precedents, which neither Rogers nor Berger seem to have found, support a claim for a foreign affairs advice privilege. The 1794 refusal of President Washington to honor the Senate's request for diplomatic materials is the major example.[101]

Berger also declines to take a functional view of the President's authority. Instead he advocates almost total legislative supremacy, except where the "Bill of Rights" intervenes, because, he says, executive privilege is "a shield for executive unaccountability."[102] However, as the cases discussed in this article demonstrate, a functional view of each branch of the government's powers is the proper perspective.[103] Moreover, the foreign relations privilege asserted in the case of the Boyatt Memorandum is narrow in scope, limited in impact, and is accompanied by an offer of substantial cooperation from the Secretary. The President and the Secretary of State asserted, rather than denied, their accountability. Furthermore, Berger does not give weight to the philosophical views of those Founding Fathers who were influenced by John Locke's thesis that in foreign affairs matters the executive is less susceptible to legislative control.[104]

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[99] *See* BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 50-58 (1958).

> The political conflict between the non-Quaker Deputy-Governor Robert Hunter Morris and the Quaker Assembly came to the fore. The Deputy-Governor, in defense of the Proprietors, declared that Indian grievances against the Proprietors had nothing to do with the massacres and that the real trouble lay in Quaker pacifism which had left the province defenseless. On the other side, the Quakers traced all ills to the wicked policies of the Proprietors. In the middle stood Franklin, who now had a considerable following among the less orthodox Quakers; he did not oppose a more just Indian policy, but he demanded immediate measures for military defense. Still the minority of die-hard Quakers which controlled the Assembly would not budge from its traditional pacifism, though the whole border might burn for it.

Id. at 50.

[100] Berger, *Executive Privilege, A Reply to Professor Sofaer*, 75 COLUM. L. REV. 603 (1975).

[101] *See* text accompanying notes 32-35 *supra*.

To find that a congressional investigation has exceeded the bounds of legislative power, it must be obvious that there was a usurpation of functions exclusively vested in the judiciary or the executive.[105] Congress clearly has legislative power in the area of foreign affairs through its powers under the commerce clause, naturalization, coinage, post office, and appropriations powers, and its authority to define offenses against the law of nations.[106] The Senate's particular and special powers flow from its role in giving advice and consent to treaties and to the appointment of ambassadors.[107] Executive officials, like the President, are obliged to execute the laws properly made by Congress.[108] But the Framers understood the distinction between adherence to law, which is required by the Constitution, and subordination to the legislature, which is not.[109]

The foreign affairs advice privilege, if it exists, arises only after weighing the varying and competing interests of each branch. The history of relations between the executive and the legislative branches cautions against the acceptance of mechanical absolutes.

Ordinarily, conflicts between the executive and the legislative branches are settled through the political process which calls for the forbearance of the judiciary. In a proper case, however, the Supreme Court may act as an umpire. When the Court so acts, its opinions form the raw material by which future nonjusticiable controversies are evaluated. It is appropriate, therefore, to examine relevant opinions of the Supreme Court.

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[102] R. BERGER, EXECUTIVE PRIVILEGE, A CONSTITUTIONAL MYTH 371 (1974).

[103] As to Congress, see Gravel v. United States, 408 U.S. 606 (1972).

[104] J. LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT ch. XII.

[105] *See* Buckley v. Valeo, 96 S. Ct. 612 (1976); Tenney v. Brandhove, 341 U.S. 367, 378 (1951).

[106] *See* U.S. CONST. art. 1, § 8, cl. 3, 4, 5, 7, 10.

[107] *Id.* art. II, § 2, cl. 2. It can only be deliberate that the Senate's authority is conferred in the article concerning executive power. The Senate's role here is not a purely legislative function.

[108] Kendall v. United States, 37 U.S. 834, 836 (1838).

[109] The distinction between adherence to law, which the Constitution requires, and subordination to the legislature, which it does not, is expressed in THE FEDERALIST No. 71 (A. Hamilton).

The Supreme Court opinion in *United States v. Nixon* suggests an instructive test to determine whether or not a valid claim to withhold information exists. The Court noted the existence of a constitutionally based presidential communication privilege:

> A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.[110]

However, the Court rejected the claim of an absolute, unqualified executive privilege.[111] The process by which this claim was rejected in the *Nixon* case is applicable to withholding foreign relations data. The Court, instead of accepting or totally rejecting the asserted claims, engaged in a balancing-functional analysis rather than in a doctrinal-mechanical approach:

> We address . . . the conflict between the President's assertion of a generalized privilege of confidentiality against the constitutional need for relevant evidence to criminal trials.[112]

In so speaking, the Court rejected the President's major premise that his opponents had to establish a compelling need before the Court could engage in balancing. The Court struck the balance by contrasting the specific need for the information in a criminal trial with "the [President's] broad, undifferentiated claim of public interest in confidentiality." At critical points in the opinion the Court indicated that it might have ruled in favor of confidentiality if the interest in disclosure in a criminal trial had been less strong and the need for confidentiality more specific.[113] A need for confidentiality might arise and might be honored, said the Court, if the subject matter sought involved military, diplomatic or sensitive material.

The Court was not called upon to delineate what matter might fall within the classification of diplomatic or military matters. Hence only case-by-case adjudication will supply definitions. However, in these specified areas executive needs for confidentiality will be entitled to the "utmost deference."[114]

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[110] 418 U.S. 683, 708 (1974).

[111] *Id.* at 706-07: "[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." *See* Brief for Respondent at 27-28 *id.*, wherein the broad claim is advanced; WESTIN & FRIEDMAN, UNITED STATES v. NIXON 337 (1974). The authorities cited in the brief for this proposition in reality support the opposite, namely, that ultimate authority rests in no single branch of the government. *See* THE FEDERALIST No. 48 (J. Madison); 1 STORY, THE CONSTITUTION 530 (4th ed.).

[112] 418 U.S. 683, 712, n.19 (1974). Significant in the opinion is its omission of any reference to Berger.

[113] *Id.* at 710, 712, 713.

A naked claim that military or diplomatic matter would be divulged is not sufficient to establish a privilege, however. The *Nixon* opinion, cited *United States v. Reynolds*,[115] wherein the Court confronted a plaintiff's demand for certain classified material relating to a crashed B-29. There the Court, with Justices Black, Frankfurter, and Jackson dissenting, reversed an order that classified material be tendered to the trial judge for *in camera* inspection:

> *It may be possible to satisfy the court*, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.[116]

How does one satisfy the Court? By showing legitimate expectations. In the *Nixon* case the court stated:

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and added to those values the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.[117]

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[114] In this case the President . . . does not place his claim of privilege on the ground [that the material involves] military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.

Id. at 710. The Court cited only C. & S. Airlines v. Waterman S.S. Corp., 333 U.S. 103 (1948), wherein the Court stated: "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." *Id.* at 111. This is dictum which is qualified by the *Nixon* and *Reynolds* cases. *See also* Zemel v. Rusk, 381 U.S. 1, 17 (1963); United States v. Curtiss-Wright Export, 299 U.S. 304, 320 (1936).

My friend and colleague, David Fellman, recently concluded that "the authority of the President in the field of foreign affairs . . . is not subject to judicial review." Fellman, *The Separation of Powers and the Judiciary*, 37 REVIEW OF POLITICS 357, 363 (1975).

[115] 345 U.S. 1 (1952).

[116] *Id.* at 10. A federal district court apparently was satisfied that the foreign affairs interest overcame the interest in disclosure in Republic of China v. National Union Fire Ins. Co., 142 F. Supp. 551 (D. Md. 1956).

[117] 418 U.S. 683, 708 (1974).

While rejecting the claim of absolute privilege, the Court specifically mentioned the President's constitutional prerogative in the conduct of foreign affairs, and with respect to national security. Repeatedly in its opinion the Court takes pains to point out that the *Nixon* case did not involve "military, diplomatic or sensitive national security secrets." It emphasized, in denying the claim of absolute privilege, that it was dealing with "non-military and non-diplomatic discussions."

In the *Nixon* case, the Court enforced a subpoena against a claim of absolute privilege because it was "essential to the enforcement of criminal statutes." The Court stressed the great respect to be given to the President's interest in confidentiality, but could not conclude in the context of the particular case that advisors would be inhibited by the

> infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution. . . . On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts.[118]

Therefore, when a conflict exists between the branches of government, absolute claims or denials of privilege are inappropriate. The competing requirements must be specifically analyzed in each instance. Flexibility must be maintained to allow for a balancing of values. The internal management of the Department of State is primarily the concern of the executive branch, and that interest, which is necessary to permit the institution to function effectively, should condition the scope of Congress' inquisitorial power.

The Secretary should be able to withhold the identity of State Department employees who author controversial criticisms of United States foreign policy. Furthermore, the Secretary should be able to withhold highly sensitive information relating to foreign governments if it is probable that its production will result in disclosures harmful to the diplomatic efforts of the United States. The recognition of such a foreign affairs advice privilege would be entirely consistent with the controlling criteria laid down by the Framers of the Constitution and the United States Supreme Court.

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[118] *Id.* at 712.

PREPARED STATEMENT OF PROF. LOUIS HENKIN

11 March 1987

My name is Louis Henkin. I hold the title of University Professor at Columbia University. Previously I held the chair as Harlan Fiske Stone Professor of Constitutional Law, and prior to that I was the Hamilton Fish Professor of International Law and Diplomacy. I have written on both international and constitutional law. One of my books is entitled Foreign Affairs and the Constitution.

In responding to the invitation to testify on the resolution before you, I do not come to offer my views as to the proper interpretation of the 1972 ABM Treaty. I appear as one who has studied our Constitution and its jurisprudence, particularly as it relates to the conduct of foreign affairs, to address the subject of Section 1 of the proposed Resolution, which is also the subject of paragraph (a) of the "resolving" section of the Resolution.

The Constitution, in Article II, section 2, provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Unlike some other clauses in the Constitution, those 25 words have not been a source of serious controversy during the two centuries of our national life under the Constitution. There has been some uncertainty, and perhaps some change from what was contemplated, as to the "advice" which the Senate may give to the President in relation to treaties;

there has been some uncertainty as to the relation between advice and consent. There has been significant development in the Senate's view of its consent role, particularly as to the amendments or reservations which the Senate may propose as the condition of its consent to a treaty.

Little of that history need concern us here. For present purposes, one may reduce the Constitutional provision to a simple proposition: the President can make a treaty if the Senate has consented to it. Of course, the President can only make the treaty to which the Senate consented; he cannot make a treaty other than the one to which the Senate consented. Therefore, the President cannot make a treaty with a text different from the one to which the Senate consented; he cannot make a treaty with a meaning different from the one to which the Senate consented.

In considering treaties for possible consent, the Senate has on numerous occasions expressed itself on the meaning of one provision or another. Sometimes the Senate has made sure that the meaning it gave to a treaty provision would prevail, by insisting that the United States enter a reservation reflecting the Senate's interpretation. If the Senate does so, the President can make the treaty for the United States only subject to such a reservation. Sometimes the Senate has refrained from proposing a reservation but has expressed its understanding of a provision. Again, the President can make the treaty only subject to the Senate's understanding. He must make the Senate's understanding the United States understanding, and a condition of United States adherence to the treaty.

The principles I have articulated and the practice I have described have not been disputed in the past and are not controversial today. They govern, I believe, the draft resolution before your committees. The President can only make a treaty that means what the Senate understood the treaty to mean when the Senate gave its consent. That is indisputable when the Senate has made its understanding plain in the form of a proposed reservation or an explicit understanding. The same principle governs when the Senate's understanding of a treaty provision is not expressed in a formal resolution but is apparent from the Senate's deliberations leading to its expression of consent. The Senate's understanding of the treaty to which it consents is binding on the President. He can make the treaty only as so understood. He cannot make the treaty and insist that it means something else.

The principle that the President can only make a treaty as it is understood by the Senate would govern even if the Senate had given no indication of its understanding of the treaty. In that event, it must be assumed -- in the absence of any evidence to the contrary -- that the Senate understood the treaty to mean what it would be understood to mean by reasonable people, reading the text of the treaty in good faith in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in the light of their object and purpose. That understanding must be assumed to have been the interpretation given to the treaty by the Senate; that interpretation, therefore, is the interpretation which the

President must adopt for the United States when he makes the treaty.

The principles I have articulated seem to me the indisputable implications of the treaty provision in Article II, section 2, of the Constitution.

Let it be clear. I am not suggesting any special prerogative for a later Senate to interpret a treaty made by a President with the consent of an earlier Senate. See Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901). I am not suggesting even that the Senate today can determine, finally and exclusively, the understanding of the Senate that gave consent to a treaty in the more or less distant past, though such a determination by the Senate today, if made after careful study, would deserve to be given great weight. Nor am I addressing the extent to which, as a matter of international law, the Senate's understanding of a treaty, if not communicated to other states parties to the treaty, is binding on those other states.

But for our own Constitutional purposes, the only treaty which the President can make (Article II, section 2), the only treaty that is a treaty made under the authority of the United States for purposes of federal jurisdiction (Article III, section 2), the only treaty that is the supreme law of the land (Article VI, clause 2), is the treaty made by the President with the consent of the Senate, as understood by the Senate when it gave its consent.

I thank you for inviting me to express my views.

LETTER FROM HENRY F. COOPER

U.S. DEPARTMENT OF STATE,
Washington, DC, August 28, 1986.
Hon. DAN QUAYLE,
U.S. Senate,
Washington, DC.

DEAR SENATOR QUAYLE: As you requested, I am writing to provide the substance of our conversation last week regarding my perception, base on our negotiations since March 1985, of the Soviet views on the restraints on development and testing of "future technologies" under the ABM Treaty. I trust these thoughts will be useful to you in your discussion with your colleagues in the Senate.

The March 1985 Soviet proposal (which is still on the table) included a ban on the development, testing and deployment of so-called "space-strike arms." The Soviets have defined "space-strike arms" to include all space-based ABM systems and components, all space-based weapons capable of attacking targets in the atmosphere and on Earth's surface, and anti-satellite (ASAT) systems of all basing modes. (Notably they left out ground-based ABM systems, which have been the focus of most of their ABM research, development and deployment activities.)

Their proposed ban on the latter two categories (i.e., space-to-earth weapons and ASATs) clearly went beyond existing international commitments. But their proposed ban of spacebased ABM systems at first puzzled us because it seemed redundant with existing U.S.-Soviet obligations under Article V of the ABM Treaty. (They did propose to ban all "scientific research" as a part of development, which went beyond the ABM Treaty, but we never took that as a serious proposal.)

Light was shed on this puzzle last year by an intensive internal review of the ABM Treaty negotiating record. During our second round, we began to draw upon that record to refute Soviet charges regarding the legitimacy of the SDI program under the ABM Treaty. Following these initial discussions with the Soviets in the second round, a very comprehensive review was undertaken in Washington between the second and third rounds, and during the third round. That review led to the conclusion that the Soviets never agreed to include ABM systems based upon "other physical principles" in the Article V prohibition. The only limitation on such ABM systems and components agreed to by the Soviets was included under Agreed Statement D which prohibits deployment without negotiation and amendment to the Treaty, but not development and testing of such systems and components.

As Ambassador Gerard Smith makes clear in his book, "Double Talk," the Soviets opposed all limitations on future ABM systems. Indeed, the earliest versions of the draft Treaty tabled by both sides were understood by both sides to apply to only then-current technologies. After the U.S. Government decided (following substantial internal debate as described by Ambassador Smith) to seek limitations of "future" ABM systems as well, the U.S. Delegation pursued that objective with diligence. Just as diligently, the Soviets opposed the U.S. objective. Careful study of the record shows that neither side was totally successful, and both sides were partially successful, in acheiving their objectives. The U.S. objective of a limitation on ABM systems based on "other physical principles" was achieved, and that limitation was embodied in Agreed Statement D. Ambassador Smith points to this achievement with legitimate pride in his book. (See p. 344 in the attached exerpts.) But he did not get everything he wanted; the record shows that the Soviets did not accept Article V to apply for substitute "devices" for ABM components (i.e., ABM interceptors, ABM launchers, and ABM radars) in spite of the U.S. negotiators's best efforts to get them to do so.

In this light, we now understand that the inclusion of all space-based ABM systems and components in the March 1985 Soviet proposal to ban "space-strike arms" was not redundant with prohibitions under the ABM Treaty—as we first thought in March, 1985. Furthermore, I believe the Soviets probably had believed, since 1972, that the ABM Treaty permitted development and testing of other than fixed land-based ABM systems composed of ABM interceptors, ABM launchers and ABM radars. This was their "half-a-loaf" in 1972. Some of my conversations with my Soviet counterparts, prior to the U.S. public announcement of the results of our comprehensive review tends to confirm this view. Since then, the Soviets have adopted a uniformly contrary view. This is understandable, because our decision to constrain the SDI program to be consistent with our previously held view of the terms of the Treaty puts them in the best of all worlds. The U.S. has legitimized the "broader interpretation" for them, if there was any doubt, while continuing the narrow restraints on activities under the U.S. SDI program. Their public position is no doubt intended to provide pressure to help perpetuate this situation.

I want to emphasize again that I believe our Negotiating Group, because of our dialogue with the Soviets in Geneva, stimulated the study by Defense, State and ACDA last summer and fall. The study was not undertaken out of the blue to "torpedo the Treaty" as some have suggested. It was a logical consequence of our negotiations. Indeed, the absence of negotiations on strategic defenses since 1972 was probably the reason why this was the first time such a comprehensive study of the negotiating record was undertaken. This is itself a rather startling fact.

From my personal study of the 1972 negotiating record and the 1972 ratification hearings, I believe what happened was simply that many on the U.S. side believed they achieved their negotiating objective of including ABM systems based on "other physical principles" under the Article V prohibitions. I believe the Soviet negotiators probably returned to Moscow believing they had agreed to limit deployment of such systems, but that they had a partial victory in not prohibiting their development and testing. I have no doubt but that if we had observed the Soviets conducting such development and testing of Article V systems based on "other physical principles," they could have explained the legitimacy of their activities with a clear rationale, based upon the Treaty and negotiating record. And our lawyers would have argued they had a case difficult to refute. I trust the current study of the record by the Senators will arrive at the same conclusion.

Best regards,

HENRY F. COOPER,
Deputy Negotiator,
Defense and Space Group.

RESPONSES OF RICHARD N. PERLE TO QUESTIONS ASKED BY SENATOR KERRY

Question: Treaty-gate/Nitze. You have labeled this episode "treaty-gate," stating that Ambassador Smith and the rest of the ABM Treaty delegation, in their presentation to the Senate in 1972, "significantly misrepresented what the Soviets had agreed to" in the Treaty.

-- Ambassador Nitze a principal negotiator and a principal Administration witness in 1972 in explaining the Treaty to the Senate; was Ambassador Nitze among those responsible for misleading the Senate?

-- Were these alleged misrepresentations due to negligence or were they willful?

Answer: U.S. negotiators made a series of statements during the negotiations in an effort to obtain Soviet agreement to a narrow interpretation of the ABM Treaty concerning ABM systems based on "other physical principles" than those of ABM systems in existence in 1972. However, neither the Treaty text nor the negotiating record show acceptance by the Soviet Union of the narrow interpretation. Unilateral assertions by U.S. officials of the narrow interpretation reflected more our hopes of that time for what could possibly result from the Treaty rather than an objective assessment of what was actually agreed in the signed Treaty document.

As to Ambassador Nitze's views, he made them clear in a speech given on April 1, 1987, in which he said, "My recollection of the ABM Treaty negotiations, reinforced by my review of the negotiating record, leads me to believe that the limits posited by the broad interpretation are all that the Soviet negotiators agreed to in a manner binding on themselves."

Question: Treaty-gate/Nunn. As you know, Senator Nunn has essentially confirmed the validity of the representations made by Ambassador Smith and others to the Senate in 1972. Senator Nunn stated that he has "concluded that the preponderance of evidence in the negotiating record supports the Senate's original understanding of the treaty that is -- the traditional interpretation."

-- Does this mean that Senator Nunn is an accessory to your "treaty-gate"?

Answer: Of course not. Let's not overdo the metaphor. I believe that while the U.S. negotiators sought Soviet acceptance of the narrow interpretation of the Treaty, the negotiating record fails to demonstrate that they actually succeeded in achieving their objective. On the contrary, the record reflects that they failed to obtain the ban they sought, and that we could never have enforced such a ban on the Soviets.

Question: The Ratification record and the "Reinterpretation." You recently acknowledged, in a press conference, that "there is no doubt that in 1972 when Administration spokesmen expressed their view of the limitations of the treaty on certain kinds of research and development they expressed the narrow view of the treaty."

-- Considering the constitutional significance of the ratification process, shouldn't the President, the Secretary of Defense, and Judge Sofaer have been apprised of your view on this subject before the President decided that the broad interpret tion was legally correct?

Answer: First, the statement attributed to me during a press conference, has not been correctly cited. I stated that "there is not doubt that in 1972, on the infrequent occasions on which the Administration spokesmen expressed their view of the limitations of the Treaty on certain kinds of research and development, they expressed the narrow view of the treaty." (Emphasis added). These statements they made did not reflect the Treaty and the negotiating record in 1972. But more to the point of the constitutional question raised, I remember the Senate debate very well. There was never a serious debate about the ABM Treaty in the Senate. No evidence exists that the interpretation of Agreed Statement D of the ABM Treaty was of any consequence in the Senate's decision to give its advice and consent. Finally, I should note that many of the statements made in 1972 by administration officials either expressed the narrow interpretation or were consistent with it.

Question: Resubmission of Treaty to the Senate. Ambassador Nitze recently stated that if the Senate had approved the Treaty on the basis of the traditional interpretation, then the Administration would be obligated to gain Senate approval before moving to a new interpretation. Since you believe the Senate approved the traditional interpretation, do you agree that the President must obtain Senate approval of the new interpretation, since it represents an amendment to the Treaty?

Answer: I don't believe I have the proper expertise to offer an informed judgement on whether the President must obtain Senate approval of the broad interpretation. I would note, however, that independent of our internal deliberations on this subject, the Soviets failed to bind themselves during the negotiations to the narrow interpretation of the Treaty.

Question: Senate Attitudes in 1972. You recently testified that no Senator would have changed his vote if the Treaty had been presented as having the "broad" interpretation. Yet Senator Fulbright testified to this Committee that he would never have supported the Treaty -- or would have sought to amend it -- had that been the case.

-- Don't you think that not only Senator Fulbright, but also many other Senators, would have found it illogical that a Treaty of unlimited duration would apply only to then-existing ABM systems, meaning that the Treaty would automatically be eroded by any advancement in technology?

-- On what basis do you assert that if apprised of a different interpretation they would not have taken a different position on the Treaty? In other words, do you believe that the Senate as a whole, including Senator Jackson, took the Senate's responsibilities so lightly that they would not have noticed or cared?

Answer: I believe one needs to put into perspective what happened during the Senate discussion of the ABM Treaty in 1972. The ABM Treaty was approved virtually without serious comment on the floor of the Senate. If any Senator had been sufficiently concerned with respect to the treatment of systems based on "other physical principles," the issue would have been the subject of debate and discussion on the floor. However, no understandings, no clarifications, no reservations were offered. Moreover, I am unaware of any detailed questioning by Senator Fulbright. I recall Senator Jackson expressing dismay at the superficial review of the Treaty by the Foreign Relations Committee, a view that the record of its hearings and floor management will bear out.

Question: Senator Jackson's Understanding in 1972. You have said that you drafted many of the questions for Senator Jackson during the ABM hearings. A review of Senator Jackson's statements at this time makes clear his understanding that the prohibitions of Article V applied both to present and future technologies.

-- In your judgment as his principal aide on this subject, did Senator Jackson understand the ABM Treaty in this way?

Answer: As I said during the hearing, I had the honor to assist Senator Jackson in his effort to comprehend the meaning of the ABM Treaty. It was his judgment that the Soviet Union would relentlessly exploit all of the latitude of the ABM Treaty and the associated Interim Agreement. I believe he voted for the ABM Treaty along with many of his colleagues because it was inevitable the treaty was going to pass. He opted to focus attention, as he admirably did, on the inadequacies of the Interim Agreement on strategic offensive arms, which was under consideration at the same time. If you look at his remarks on the floor of the Senate during the long debate in which the ABM Treaty was barely mentioned, you will not find any reference by him to the interpretation of Agreed Statement D.

Question: Jackson On Significance of Ratification. In your statements on strategic policy, you have repeatedly invoked Senator Jackson, on the basis of your extended work with him as an aide.

-- Would Senator Jackson have regarded the Senate's constitutional role in treaty-making as being threatened by the President asserting an interpretation different from that given during the ratification proceedings?

-- What is the point of the Senate engaging in detailed questioning to elicit an understanding of the meaning of a treaty if that understanding can be renounced later by the Executive branch?

Answer: I cannot comment on Senator Jackson's view of the Senate's constitutional role in treaty-making in light of the assertion of a different interpretation. As to the matter of why the Senate should engage in detailed questioning, the Senate has the power to decide in each instance just how far it wishes to go in establishing the meaning of a treaty on any question of interest to the Senate. Though the Senate is entitled to full and fair presentations by Executive officials on the meaning of treaties, it remains the Senate's interest to inform itself of the treaty that was negotiated. I must add that as his advisor at the time I consider that I was remiss in not urging him to challenge an interpretation of Agreed Statement D that was inconsistent with its prima facie meaning, a point I now, 15 years later, understand.

Question: In narrowly focusing on what is becoming a legal debate, we seem to be missing the big picture. What is really at issue here, in the context of our arms control objectives, and the opportunities that the SDI program might afford us?

Answer: While we are a nation of laws and, unlike the Soviet Union, we will scrupulously adhere to our legal obligations, the debate about legal issues in the ABM Treaty should not obscure what is at stake for our security. We are seeking through the SDI program to find ways to alter the fundamental strategic relationship between the United States and the Soviet Union. We wish to be able to maintain the peace with defenses that can save lives, rather than through a threat of retaliation that would avenge lives. This ABM Treaty debate has arisen because, as we pursue our basic goal in SDI, we are seeking to take advantage of all of our rights under the Treaty. If we are successful in the SDI program, in one step we will make the world much safer, by reducing or eliminating the threat of nuclear ballistic missiles, and we will set the stage for a much more stable relationship between the United States and the Soviet Union.

Question: What involvement have you had in the ABM Treaty Interpretation? Can you give us any insights into how the question arose in the first place?

Answer: On July 25, 1985, the Senate Armed Services Committee held a hearing on the nomination of Donald Hicks to be the Under Secretary of Defense for Research and Engineering. Senator Levin submitted a series of questions to Dr. Hicks to be answered for the record dealing with "SDIO terminology." Some of the terms in question are used in the ABM Treaty in association with ABM systems "based on other physical principles." Responses to these questions were coordinated among the appropriate agencies of the Executive through the SDI Interagency Group. My own involvement in the Treaty interpretation question arose because I chaired that group. It was through the activities of that group during August and September of 1985 that it became clear the subject should be examined in much greater detail, which is what Judge Sofaer, State Department Legal Advisor then accomplished.

During 1985 the subject of the interpretation of the ABM Treaty for systems based on other physical principles arose elsewhere in the Administration as well. In particular, discussions our delegation at the Nuclear and Space Talks was having with the Soviets touched on this matter, and the SDI program was advancing to the point where it needed greater precision regarding the Treaty obligations in this area.

SOVIET PARLIAMENTARY RATIFICATION DELIBERATIONS

Supplementary Submission by Ambassador Raymond L. Garthoff to Testimony of March 11, 1987

In the Soviet parliamentary ratification deliberations, in the absence of Foreign Minister Andrei Gromyko, First Deputy Minister of Foreign Affairs Vasily V. Kuznetsov, "on behalf of the Soviet Government," gave the Presidium of the Supreme Soviet of the USSR the official Soviet Government position on the ABM Treaty. He drew attention inter alia to the provision that "The parties are obligated not to create and not to deploy sea, air, space, or mobile land based antiballistic missile defense systems or components." He presented this as a clear obligation of the Treaty as a whole, thereby affirming the official Soviet government interpretation that the provision of Article V(I) dealing with creation (development and testing), as well as deployment, of any space-based ABM system or component, was not curtailed or overridden by Agreed Interpretation D or any other provision. He did not specifically address the matter of future systems based on other physical principles in his summary account.

Marshal Andrei Grechko, Minister of Defense, also testified before the Presidium of the Supreme Soviet. He stated that the ABM Treaty "does not place any limitations on the conduct of research and experimental work directed toward solution of the problems of defense of the country against nuclear-missile strikes." That broad statement essentially asserts what adherents of both the traditional restrictive and so-called broad interpretations agree: the treaty does not prohibit research or laboratory experimentation short of developmental testing. Even if the term "experimental work" were construed as including system or component testing, in my view not a warranted reading. it would still be entirely compatible with permitted development and testing of fixed land-based systems and components.

Contrary to allegations made by proponents of the new broad interpretation, Grechko did not assert that development and testing of new types of space-based, air-based, sea-based or mobile land-based ABM systems or components was allowed. Indeed, he made no statement about such systems, nor about future systems based on other physical principles.

In the Soviet ratification hearing, no one else addressed any of these issues.

The quotations above and further observations concerning the Soviet ratification hearings are all taken from the lengthy account of the proceedings (of September 29, 1972) published in Pravda on September 30, 1972 (my translation).

The United States government was aware of these Soviet statements in 1972 and saw no reason to challenge the Soviet acceptance of the same (now termed "restrictive") interpretation. Similarly, the Soviet Union was aware of the statements of the restrictive interpretation in the U.S. Senate hearings, and did not challenge them either. Both the United States and Soviet governments in 1972 clearly interpreted the ABM Treaty in the same way.

RESPONSES OF RAY L. GARTHOFF TO QUESTIONS ASKED BY SENATOR KERRY

Question.

Your letter to Senator Levin on the ABM Treaty "exotics" issue states that during the negotiations the Soviet delegation changed its position on whether future systems and components would be prohibited by the Treaty as the Treaty negotiations progressed. What leads you to believe that the Soviets ultimately agreed to include futuristic ABM systems within the restrictions of the ABM Treaty?

Answer.

See my response to Question 3A of your Supplementary Questions for the Record.

Question.

You have said that Judge Sofaer has made a number of statements about the negotiations and the meaning of the ABM Treaty which are "not true." [For example, you have said that his statement that the Soviets rejected language to extend the ABM Treaty to future systems is false, that no negotiator has denyed that ABM systems and components prohibitions applied only to then-utilized physical principles, and that there are other errors in Judge Sofaer's presentation.] Is it fair to say that the Administration's so-called "broad interpretation" of the Treaty is so incorrect that is fraudulent?

Answer.

In my judgment the Administration's so-called "broad interpretation" is completely invalid. The report on the negotiating record and other public presentations of the case by Judge Sofaer are fatally flawed in many aspects and as a whole. I do not know whether the cause is conscious misrepresentation or incompetence or both.

Question.

Do you believe the SDI program threatens the ABM Treaty? If so, how?

Answer.

I believe that a Strategic Defense Initiative exploring technologies for ballistic missile defense confined within the development and testing constraints of the ABM Treaty is possible. I believe the Administration's SDI program already approaches the bounds of the treaty constraints and may at some point within the next few years exceed them. Certainly a change of policy to permit tests banned by the treaty but "allowed" by the unilateral broad interpretation would speed that day. Ultimately, a program aimed at providing a ballistic missile defense of the country would necessarily require a choice at some point between the ABM Treaty and ballistic missile defense.

Question.

What actions if any could the Congress take to preserve the integrity of the Treaty?

Answer.

I believe the Congress should act to prevent the Executive from any actions that violate the ABM Treaty so long as it remains the law of the land, including prevention of any acts that would in fact violate the treaty through unilateral "reinterpretations". Whether such Congressional action can be most effective through explicit limitations on expenditures of appropriated funds, or some other form of binding legislation, or a combination of actions, I do not know. I would note that any loophole that would permit an administration to make a "finding" on Soviet noncompliance, or a self-serving interpretation of what the treaty permits, would be ineffective. Even strict limits on use of appropriated funds alone might be insufficient; some zealous "Colonel South" may find funds elsewhere, even in private industry, or from another country beholden to us or currying our favor.

Question.

1. It is my understanding in 1972, every member of the U.S. negotiating team understood that components and systems based on other physical principles were included within the prohibitions of Article V of the Treaty against the testing and development of non-fixed land based ABM components and systems, and that Agreed Statement D referred to the right to develop and test, but not deploy, components and systems based on other physical principles in a fixed-land based mode only. What is your recollection of the understanding of the U.S. negotiators then? Have you had any discussions with the negotiators since regarding this issue? What point of view do they take now? Has any of the negotiating team changed his position? If so, have they told you on what basis?

Answer.

1. To the best of my knowledge all members of the U.S. SALT Delegation in 1972 understood that any and all ABM systems and components, current and future, including any based on other physical principles, were covered by and included in the Article V(1) ban on developing and testing non-fixed land based components and systems.

Based on conversations with most of those persons in recent months, all but one confirm that the above was and remains their understanding. The one exception is Ambassador Paul Nitze, who has told me that until the fall of 1985 he too believed that to have been the situation, but that after a careful review of the negotiating record with hindsight he now believes that was not the understanding that we had established beyond question in the negotiation with the Soviet side. I and other members do not agree with his reassessment.

Question.

2. Are you aware of any statements by the Soviet Union, either at the end of the negotiating process or since by which the Soviet Union expressed a contrary understanding, or reserved the right to develop and test such ABM components and systems in other than a fixed-land based mode?

Answer.

2. I am not aware of any Soviet statements since agreement on the ABM Treaty text in 1972 that expresses a contrary understanding to the traditional understanding (as stated in summary form in the reply to Question 1 above), and I have followed Soviet pronouncements and writings in this field. There have been many that reflected or explicitly included that understanding.

Question.

3. In a chapter on BMD and East-West relations in a 1984 book on ballistic missile defenses, you wrote that the Soviet Union initially objected to the U.S. proposal to include systems or basic components based on new physical principles within the ABM Treaty, but that after five and a half months the Soviets accepted the ban. (a) Can you specify the date and means by which the Soviet Union communicated its change in position on this issue to the U.S.? (b) You noted that the Soviet Union had reaffirmed this undertaking on April 29, 1983 in an interview in Pravda with Col. Gen. Nikolai Chervov. Can you provide the Committee with a copy of that interview, as well as any other statement by Soviet officials regarding the Soviet position on this issue prior to the reinterpretation offered by the Reagan Administration?

Answer.

3a. The United States first proposed on August 17, 1971, two provisions: (1) a ban on deployment of any ABM systems or components based on other physical principles, and in addition (2) a ban on the development, production, testing and deployment of all such systems and components that were sea-based, air-based, space-based or mobile land-based. Agreement was reached on both, and on a number of other relevant overlapping and reinforcing provisions of the draft treaty, over the period from the fall of 1971 to the early spring of 1972. Thus agreement was reached on Article V(1) in mid-September 1971, including explicit Soviet acceptance of its coverage of *any* ABM system or component, present or future, based on the existing components or "other devices" capable of performing the functions of existing components. In December, the language of Article I banning any defense of the territory of the country or "base" for such a defense was agreed. Also in December, the language of Article II was changed to insert the words "currently consisting of", in order to make clear that the listed components were only the current ones, and that the article was functional and not restrictive. Article III, while not fully agreed for other reasons until April, by early 1972 had language banning deployment except as provided in the article. It was in that context that the Soviets had objected that Article V(3), after late December recast as a draft Agreed Statement, was "superfluous", and "unnecessary", and "premature". They *never* objected on grounds that such deployment would be necessary or useful. But we persisted and in early 1972 as we were polishing up the final language of Agreed Statement D and in effect completing our agenda on the "future" or "exotic" or "other principles" question, a senior Soviet negotiator on January 26 expressed satisfaction as he remarked to me that the Soviets had now accepted the American position on the subject completely. (This is, of course, in the negotiating record.)

3b. Colonel General Nikolai Chervov's article, an interview in the Czechoslovak newspaper *Bratislava Pravda*, April 29, 1983, is appended in full, in the official FBIS translation. General Chervov is, and when he wrote the article was, the chief of the Soviet General Staff directorate in charge of negotiating, interpreting, and applying arms control agreements in the Ministry of Defense. He stated that the ABM Treaty "bans both sides from developing anti-missile defense based on new physical principles--lasers, microwave radiation, beam weapons and so forth," and he also quotes in full Article V(1). (Incidentally, in addition, he stated that nuclear-pumped X-ray lasers--one of the SDI technologies--would also violate the 1963 limited nuclear test ban treaty banning nuclear explosions in outer space, and the 1967 space treaty banning the placing of weapons of mass destruction in space.)

Question.

4. What evidence is there, in addition to Secretary Rogers' statement in the Letter of Submittal to the Senate, that Article II of the Treaty defines ABM components functionally, and not restrictively, and that Article II is intended to encompass all ABM components capable of substituting for those specified?

Answer.

4. At the time the language of Article II was amended to include the clarifying restriction "currently consisting of", I as the negotiator noted to my Soviet counterparts that the effect of the change would be that ABM "components" would include all, future as well as current, components. I noted that while the nature of constraints on future systems would be dealt with elsewhere than in Article II, the term components was not restrictive to the current ones. That proposal was then accepted by the Soviet delegation and the changed language confirmed the next day (December 21, 1971). The effect of this change, embracing future components (those based on other physical principles) in Article II, was again explicitly confirmed to me by the Soviet negotiator on January 26, 1972.

Question.

5. I am concerned that certain U.S. activities under the SDI program could well be viewed by the Soviet Union as not in compliance with the ABM Treaty, because some tests to be conducted in a non-fixed land based mode may not be distinguishable from compliant activities on the basis of Soviet national technical means, and because some tests could well be viewed as prohibited development and testing of prototypes of ABM components or systems. Do you have any recommendations for how the U.S. could best respond to this compliance and verification problem?

Answer.

5. I share the concern that some planned tests under the SDI program may raise questions as to consistency and compliance with the ABM Treaty. Perhaps Congress should legislate a continuing review by itself or by some mixed legislative-executive group to ensure that all U.S. activities are in compliance with the law (the ABM Treaty). It would also be highly desirable that such planned activities be discussed with our treaty partner, the Soviet Union, in advance so that they could be assured that our activities were in compliance. Such a practice could usefully include notification and discussion of planned Soviet, as well as American, tests and other activities to reassure us. Both sides, and the viability of the treaty, would benefit from such mutual review and reassurance. Advance consultation and explanation would surely be more productive than arguments about compliance after the event.

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

TODAY, THE SENATE FOREIGN RELATIONS AND JUDICIARY COMMITTEES ARE HEARING TESTIMONY OF GREAT IMPORTANCE TO THE FUTURE DEFENSE OF OUR NATION, AND MORE SPECIFICALLY, TO THE UPCOMING NEGOTIATIONS OF THE AMERICAN DELEGATION IN GENEVA--THAT OF THE INTERPRETATION OF THE ABM TREATY.

WE WILL CAREFULLY EXAMINE INTERPRETATIONS OF THE TREATY AS PRESENTED TO AND UNDERSTOOD BY THE SENATE IN 1972 AS WELL AS THE CONSTITUTIONAL IMPLICATIONS OF FAVORING A PARTICULAR INTERPRETATION OF THE TREATY. CERTAINLY, IT IS OF TREMENDOUS IMPORTANCE WHETHER THE "BROAD" VIEW OF THE TREATY, WHICH DEFINES ABM SYSTEMS AND COMPONENTS IN TERMS OF 1972 TECHNOLOGY, OR THE "NARROW" VIEW WHICH EMPHASIZES THE FUNCTION OF THE ABM SYSTEM, IS ADOPTED.

BUT OF EVEN GREATER IMPORTANCE PERHAPS, IS OUR RECOGNITION THAT THROUGH OUR ACTIONS PRIOR TO FUTURE ARMS NEGOTIATIONS, CONGRESS MUST NOT ACT IN A WAY THAT WILL IMPEDE THE CONSTITUTIONAL POWER GRANTED TO THE PRESIDENT TO MAKE FUTURE TREATIES-- TREATIES THAT MIGHT EASILY SUPERSEDE THE DOCUMENT BEFORE US IN TERMS OF REFLECTING A MORE RECENT UNDERSTANDING OF THE AGREEMENT BETWEEN THE SOVIET UNION AND THE UNITED STATES OR BY SPECIFIC LANGUAGE. WE MUST RECOGNIZE THE SEPARATION OF POWERS AT ISSUE IN THIS EXAMINATION AND NOT USE THE ADVISE AND CONSENT FUNCTION OF THE SENATE AS A GUISE TO DISTORT OR DIMINISH THE POWER OF THE PRESIDENT TO MAKE TREATIES.

RESPONSES OF ABRAHAM D. SOFAER TO QUESTIONS ASKED BY SENATORS BIDEN AND PELL

I. The Text of the Treaty

1. Agreed Statement D explicitly refers to ABMs based on "other physical principles" as "ABM systems" and "components." Doesn't that suggest "serious shortcomings" in your own statement that "every" reference to systems and components in the Treaty refers only to 1972-era technology?

Answer

The reference proves my point, in that in Agreed Statement D, and only there, are the words "systems" and "components" qualified by the term "based on other physical principles." (The text refers to "ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars".) Agreed Statement D uses the terms "ABM systems" and "components", but qualifies both those terms in such a manner as to imply for them a different meaning than the meaning they have in the provisions within the Treaty proper, i.e., the systems and components currently in use.

2. Article II(2) lists ABM systems and components as being those operational, under construction, undergoing testing, undergoing overhaul, repair, or conversion, or mothballed. Why does this necessarily imply that future systems (which would eventually fall into one of those categories) are not covered? Is it not fair to assume that this list was designed to provide a needed definition for the Treaty's quantitative limits on permitted deployments?

Answer

The listing in Article II(2) does not "necessarily imply" anything. It is one of several provisions which indicate that the Treaty drafters were focusing in the Treaty itself on the ABM system then in use. Attached is a memorandum I recently received from Dr. Fred Singer, who finds significance in the Russian language version of Article II(2). He concludes that this text indicates that only systems using 1972 technology were intended to be covered.

3. Why do you suggest that the negotiators should have included components "undergoing research" in the list? Wouldn't that imply that components would be limited in the Treaty while still in the research stage, which was not the intent?

Answer

This is one example of language the negotiators could have included in Article II(2) that would have indicated an intention to regulate OPP devices in the Treaty; other language could have been included for the same purpose.

4. Why do you suggest that the exotic ABMs would be covered only if the negotiators had included the phrase "developed in the future"? Aren't components "developed in the future" already included, even under your interpretation, provided they are not based on "other physical principles"?

Answer

The negotiators could have achieved the narrow view if they had obtained Soviet agreement to the language proposed by the United States for what became Article V(1). They failed to do so, but some negotiators now contend that the Soviets agreed to an interpretation of the language of the Treaty that is the equivalent of the U.S. language which they rejected.

5. As you have pointed out, under international law, the preferred interpretation of a treaty is one which gives a meaning to all of the terms of the treaty. Common sense indicates that this rule of construction should apply particularly to words which are specifically inserted in previously-agreed texts of crucial passages of a treaty, such as the word "currently" in Article II of the ABM Treaty. Under your interpretation, what purpose does the word "currently" have in the language of Article II, and why was it inserted?

Answer

While the functional part of the definition of ABM systems in Article II(1) can be read to reflect the parties' intention to cover all systems, current and future, the use of the word "currently" can reasonably be read as having had the purpose of indicating their intention to deal with current systems in the Treaty proper, leaving future systems to be dealt with in Agreed Statement D. The negotiating record reveals in detail why "currently" was included in Article II. It was intended as a compromise between the Soviet and U.S. positions, and was offered by the United States with the statement that the issue of constraining future systems would be resolved elsewhere than in Article II. See Ambassador Nitze's account, attached to these answers.

6. In testimony before the Senate Armed Services Committee, you said that the traditional interpretation would render redundant the entire section of Article II describing currently existing components. Without that definition of components, how would the Treaty have placed quantitative limits on those ABMs which were permitted?

Answer

We are not able to find such a statement. Please specify the testimony referred to in this question.

7. You have said that nothing in Agreed Statement D "suggests that it applies only to future systems that are fixed land-based." Agreed Statement D begins with the following phrase: "In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III [which provides only for fixed, land-based systems] . . ." What role, then, do you ascribe to that phrase?

Answer

Article III limits each Party to deployment of only the limited numbers of ABM systems and components defined in Article 2. Agreed Statement D makes clear that no OPP systems or components of any kind may be deployed anywhere without discussion and agreement, thereby insuring that the obligation accepted in Article III is fulfilled.

8. In Senate testimony in November of 1985, you said that under the traditional interpretation, the limits on deployment in Article III would "eliminate all need" for Article V. Doesn't Article V limit development and testing as well? Do you stand by your statement?

Answer

The answer referred to pointed out a redundancy as to the deployment aspect of Article V, if Article III is read to incorporate a meaning of systems and components supported by the narrow view. That is, Article III, by specifying that launchers and interceptor missiles are to be located at "launch sites," can be read as allowing deployment only of fixed land-based systems, if "ABM systems" is read to include all OPP devices (as it would be under the restrictive interpretation).

9. In a recent letter to Senator Nunn, you denied that your interpretation "undercuts the basic purposes of the Treaty." Why would the two sides agree to limit only those ABM systems then in use if the Treaty were intended to be of unlimited duration? Indeed, doesn't that strike you as absurd?

Answer

The purposes of the Treaty go back to the May 20, 1971 agreement between the U.S. and the Soviet Union. We agreed with the Soviets to concentrate on obtaining an ABM agreement limiting "deployment" of such systems. Ambassador Smith pressed for coverage of future systems, and President Nixon agreed to allow him to try to obtain the restrictive interpretation. Coverage of future systems was never, however, a priority of either government, particularly beyond a prohibition on deployment. Furthermore, the two sides could only agree to what both sides were willing to agree. The record shows that the U.S. delegation made arguments such as those suggested by this question, but that the Soviets refused to agree to regulate "unknown" devices in the Treaty, except in Agreed Statement D. The Soviet position was not "absurd", since it guaranteed nondeployment without amendments. The Treaty is of unlimited duration, but clearly contemplated research, development, and testing, not only of ABM systems and components, but also of OPP systems and components. The basic purpose of the Treaty, therefore, was to prevent deployment of ABM systems beyond the limited numbers of conventional systems described in Article 3. The only issue is whether development and testing is limited to fixed, land-based OPP devices. Ambassador Nitze's recent speech puts the issue into proper perspective.

10. You have argued that your interpretation is "entirely consistent" with the Treaty's fundamental purpose. However, in removing all limits on development and testing of exotic systems, your interpretation destroys many of the Treaty's critical protections against "breakout." In practice, an entire space-based system could be put in place ostensibly for "testing," leaving no agreed distinction between permitted testing and prohibited deployment. What protection does your interpretation offer against such a breakout?

Answer

See answer to Question 9. In addition, the possibility of a "breakout" is not unique to OPP systems. In fact, as indicated in the latest Administration report to the Congress on Soviet noncompliance with arms control agreements, the Krasnoyarsk radar and other Soviet ABM-related activities gives rise to continuing concerns that the USSR may be preparing an ABM defense of its national territory.

11. Article I phrases its prohibitions in terms of the deployment of "ABM systems." You have argued that "ABM systems" as defined in Article II does not include exotic ABM systems. In your interpretation, does the Article I prohibition include exotic ABM systems? If not, doesn't that render the Treaty patently -- indeed ridiculously -- inadequate in achieving its own express purpose? If so, why doesn't this functional definition, which covers exotic systems, extend to other portions of the Treaty?

Answer

The negotiating record indicates that the Soviets agreed that the Treaty proper would regulate only the ABM systems then known to the Parties. The Soviets ultimately agreed, however, that the Parties should preclude the deployment of OPP systems and components that could substitute for those the Treaty allowed to be deployed. They used Agreed Statement D to reflect that understanding. This result is certainly not "patently -- indeed ridiculously -- inadequate," as the question suggests, but a major arms control achievement. In any event, it is the result that the negotiating record shows to have been reached.

II. Negotiating Record

1. In your Harvard Law Review article, you argued that the "evidence available" from the public statements concerning the negotiating record, including those of the negotiators, "confirms" your interpretation. But the public statements of every U.S. ABM Treaty negotiator except Ambassador Nitze oppose your interpretation, and Ambassador Nitze had himself opposed this view until recently. Given these facts, do you think your statement is a fair summation of the "evidence available" from "public statements" concerning the negotiating record?

Answer

Yes, the statements made concerning the negotiating record are fair.

2. In arguing that exotic systems are covered only by Agreed Statement D, you have said the U.S. negotiators told the Soviets that without such a statement, even deployment of exotics would be allowed. But weren't these statements made at a point in the negotiations when the draft text of Article III would have allowed deployment of fixed land-based exotics and before Article III was agreed in its final form, which prohibits all deployments of ABM systems except those that are explicitly permitted? Did any U.S. negotiator make such a statement after agreement on the final form of Article III?

Answer

Agreed Statement D was fully negotiated before the parties agreed to the text of Article III; therefore no such statement would have been necessary after Article III was agreed.

3. If the ratification record and the record of subsequent practice both support the traditional interpretation and if the negotiating record were inconclusive, would there be a basis for abandoning the traditional interpretation?

Answer

We remain convinced that the broad interpretation is fully justified on the basis of the Treaty text and negotiating record. The ratification record and subsequent practice are being addressed separately.

III. Ratification Record

1. In October of 1985, you presented what you now acknowledge was a seriously flawed analysis of the ratification record. You have since blamed that analysis on "young lawyers" on your staff, and stated that you did not review it personally. Why did you not take steps to ensure that the information you presented to the Congress was accurate?

Answer

I took all the steps I thought necessary to ensure that the information presented to Congress was accurate.

2. In Senate testimony in November of 1985, referring to the ratification record, you said: "It is my job to look at these statements and see what they are worth in some rigorous analysis." If that is your job, do you feel that you did your job adequately?

Answer

I believe that I did my job appropriately. I regret that errors were made and accept responsibility but note that such errors sometimes occur.

3. Under both international law and the constitutional law of the United States, the record of Senate ratification of a treaty is of central importance in interpreting the treaty's terms. Why did you not conduct a comprehensive review of the ratification record prior to coming to your conclusions on interpretation of the ABM Treaty? Why is this review only being conducted now, long after your conclusions were presented to the President and the Congress? As a matter of practice, is it acceptable for the United States to reinterpret major treaties without conducting thorough studies of their ratification records?

Answer

The role of the ratification record in treaty interpretation will be discussed in a separate study. I have made clear that I have never previously been asked for nor have I given a conclusion on the ABM Treaty other than on its language and negotiating history. The President has recently directed a comprehensive review of other, relevant issues, and it is underway.

4. You have acknowledged that questioning by Senator Levin and others in November 1985 gave you a "clue" that there were serious flaws in the material you presented on the ratification record. Yet you did not inform Congress that the material was inaccurate and that you no longer stood by it until recently. Why the delay?

5. You have referred to the Secretary of State's 1972 transmittal letter as "the most comprehensive official USG explanation of the ABM Treaty." You cite this document as supporting your interpretation of the Treaty, which relies on the notion that Article II is not a functional definition. Yet under the heading "Future Systems," the Secretary's letter states that: "Article II(1) defines an ABM system in terms of its function as 'a system to counter strategic ballistic missiles or their elements in flight trajectory,' noting that such systems 'currently' consist of ABM interceptor missiles, ABM launchers and ABM radars." These words immediately follow the words you quote in your analysis. Why did you not include this passage in your analysis, and how could you conclude that the letter supports your interpretation?

Answer

I conceded that the material brought to my attention was incomplete. Errors and ommissions were corrected thereafter, particularly in the memorandum of August 1986. I have undertaken personally to review the record and provide a comprehensive study, including an analysis of the Secretary's letter.

I testified on this question recently and among other things noted that I viewed the issue of the ratification process as having little or no bearing on the question of the Soviet Union's obligations under the Treaty. Nothing occurred during ratification that would have materially altered the Soviet Union's duties. Thus, I testified before the Senate Armed Services Committee on November 21, 1985:

> Judge SOFAER. . . . These statements represent only the view of one party to a treaty in which there were two parties. I think that you have to look at the negotiating history and the language of the treaty itself to derive what the binding commitments are, the mutually binding commitments.
>
> Senator LEVIN. I agree with that, Mr. Chairman.

Again, in my August 1986 report, filed with the Senate, I took the same position:

> . . . Some clear statements favoring the restrictive view were made to the Senate during the ratification process. While these may have a bearing on the President's obligations to the Senate, they were insufficiently authoritative or significant to constitute subsequent practice that binds the U.S. with respect to the Soviet Union. . . .
>
> . . . Nothing in the statements made during the ratification process lends them sufficient authority to expand the scope of what the parties actually agreed in the Treaty, as reflected by its terms and its negotiating record. Whatever duty the President may have to the Senate because of prior Executive Branch statements, the U.S. has no greater duty to the U.S.S.R. than the U.S.S.R. was willing to accept as a duty to the U.S.

Finally, the memo on which these questions focus was never used or relied upon for any decision concerning the ABM Treaty. The SDI program has remained structured to conform to the narrow interpretation.

IV. Subsequent Practice of the Parties

1. In October of 1985, you presented what you now acknowledge was a seriously flawed analysis of the record of subsequent practice. You have since blamed that analysis on "young lawyers" on your staff, and stated that you did not review it personally. Why did you not take steps to insure that the information you presented to the Congress was accurate?

Answer

I took all the steps I thought necessary to ensure that the information presented to Congress was accurate.

2. Under international law, the subsequent practice of the parties is a key consideration in interpreting the meaning of treaties, more important than the negotiating records. Why did you not conduct a comprehensive review of the subsequent practice of the parties prior to coming to your conclusions on the interpretation of the ABM Treaty? Why is this review only being conducted now, long after your conclusions were presented to the President and the Congress? In what cases do you think it is appropriate for the United States to publicly reinterpret a major treaty without making a thorough study of the subsequent practices of the parties to the treaty?

Answer

The study of subsequent practice is being undertaken at the President's direction, as an important element of any decision he may make with respect to the ABM Treaty's meaning. My views on the implications of subsequent practice will be included in the study on that subject.

V. Procedure

1. Under international and U.S. law, the subsequent practice of the parties, the ratification record, and the negotiating record are all relevant to the interpretation of treaties, a point which you have confirmed. Why did you study only one of these three bodies of evidence before advising your superiors that the broad interpretation is "fully justified"?

Answer

I studied the text and negotiating record because I was asked to give my opinion on differing points of view within the Executive branch on those subjects. The question incorrectly assumes facts concerning my advice.

2. In Senate testimony in November of 1985, you said that you had "completed" collecting the negotiating record before reporting your conclusions to the President. Yet in a recent letter to Senator Nunn, you acknowledged that you are "continuing to search for relevant materials." Can you explain the discrepancy? Doesn't the existence of a continuing search imply that discussions with the negotiators might have provided additional details of which you were not aware? Isn't it imperative that your "search for relevant materials" include detailed discussions with all of the U.S. Treaty negotiators?

Answer

First, no discrepancy exists. The collection of negotiating history can be complete in terms of particular sources, and other materials might nevertheless be discovered thereafter by the same or other sources. Materials relating to the negotiating record in fact continue to be uncovered in the course of studying the ratification period and subsequent practice. All relevant materials that are located will in due course be included in the studies.

Second, it is not imperative that detailed discussions be held with all of the U.S. Treaty negotiators. Discussions were held with Ambassador Nitze, and with other senior arms control personnel thoroughly familiar with the issues. As I testified, I had access to the detailed, written position of Graybeal and FitzGerald, as well as to books by Smith and Rhinelander, whom I also debated in public. Ambassador Nitze also gave me the benefit of his discussions with members of the negotiating team, including Mr. Garthoff.

3. One of the purposes of the Standing Consultative Commission is to resolve ambiguous issues relating to the ABM Treaty. If there was any doubt as to what the Soviets had agreed to, why was the SCC not used to resolve the issue? If there is really any concern that upholding the traditional interpretation would amount to unilateral restraint, why not go to the SCC and translate the many public Soviet statements of the traditional view into a binding agreed statement?

Answer

Discussion in the SCC and negotiation with the Soviets are options available to the President in this matter.

4. Assume that the Soviets suddenly announced a complete reinterpretation of a major treaty, with no prior consultation between the parties. Assume further that they subsequently revealed that they had done so without thoroughly examining either the subsequent practice of the parties or the records of their own ratification procedures, and without consulting any but one of their own negotiators. What do you think the U.S. Government reaction would be? Isn't it likely that we would accuse them of a profound disrespect for the principles of international law?

Answer

This question is hypothetical and we respectfully suggest has no bearing on the present issue. Experience has demonstrated that the Soviet Union only regards itself bound by clear commitments, and that it has violated even commitments that are clear, as in the case of the Krasnoyarsk radar.

5. The Wall Street Journal recently reported that during work on the reinterpretation, one of your aides raised a criticism -- implying that the Department's work did not represent a balanced, judicious, and dispassionate analysis -- and you replied: "Your Commander-in-Chief needs this to bargain away Soviet missiles." Is that report substantially accurate? If you were judging a case in a court of law and had such a strong opinion concerning the desirability of a particular outcome, would you disqualify yourself?

Answer

The report is incorrect.

RESPONSES OF ABRAHAM D. SOFAER TO QUESTIONS ASKED BY SENATOR KERRY

1. It is my understanding that you did not seek the opinions of any of the negotiators of the ABM Treaty apart from Paul Nitze prior to reaching your conclusions about the Treaty's supposed failure to prohibit development and testing of futuristic components and systems. Don't you think that has left you open to justifiable charges that your review was neither fair not complete?

As I indicated in my responses to questions at the March 26 hearing, in addition to my many discussions with Amb. Nitze, I reviewed carefully the 1985 study by Mr. Graybeal and Mr. FitzGerald, both of whom were negotiators who took the narrow view of the ABM interpretation question, as well as relevant excerpts from the books written on the subject by Amb. Smith and Mr. Rhinelander. I debated both Amb. Smith and Mr. Rhinelander and was therefore exposed to their views in the most direct sense. Finally, Ambassador Nitze had conversations from time to time with Garthoff, Graybeal, Smith and others, the contents of which he relayed to me.

No basis exists, therefore, for charges that my review was unfair or incomplete because of a lack of consultation. I had access to all points of view, including those of all the major U.S. negotiators. Nonetheless, I do agree that it would be desirable to enter into a more intensive communication with the negotiating team, and the Administration is considering whether it is possible to do so and the manner in which to conduct such an exchange.

2. In response to a question from Senator Levin, you have stated that you are "not qualified to discuss the technological aspects of particular strategic defense systems" in connection with the ABM Treaty, and therefore have refused to state what ABM systems could as a practical matter be developed in a sea-based, air-based, space-based or mobile land-based mode" under your so-called broad interpretation of the ABM Treaty. If you are not qualified to answer this question, who is? Will you specify, for the Record, the Administration's view on what components and systems can legitimately be developed or tested under the broad interpretation of the Treaty? Please be as specific in your answer as possible.

It would be premature to attempt to provide such a listing of systems and components. As you know, we have not yet completed the additional studies on the interpretation question. Further work also remains to be done in applying these Treaty interpretations to specific SDI activities. For the present, you may find it useful to examine the April 1987 DOD Report to the Congress on the Strategic Defense Initiative, which contains discussions of a number of specific possible systems and components.

RESPONSES OF ABRAHAM D. SOFAER TO QUESTIONS ASKED BY SENATOR THURMOND

1. Does your review of the negotiating record indicate that the U.S. repeatedly tried to include language that would clearly have prohibited development and testing of future ABM systems, and that the Soviets refused to limit what was unknown?

Yes. My August 1986 study of the negotiating record concluded: (1) that U.S. negotiators proposed an explicit ban on development, testing and deployment of all "devices", in addition to ABM missiles, launchers and radars, that could perform the functions of conventional mobile systems and components; (2) that the Soviets rejected this language and opposed, as a matter of principle, our attempt to regulate in advance unknown substitutes for the ABM systems and components then currently in use; and (3) that the Soviets therefore proposed, and the U.S. accepted, substitute language that fails to establish that such devices were covered by the Treaty.

2. How does U.S. practice in treaty interpretation differ from the Vienna Convention, which the U.S. has not ratified, and how do these differences bear on the issue of ABM treaty interpretation?

My studies on the ratification process and subsequent practice will go into these matters of treaty interpretation and practice in some detail. In general, no differences in principle exist between the Vienna Convention and U.S. practice in these areas, although the practice of U.S. courts in the use of such materials for the purpose of treaty interpretation may vary in some degree from those of international bodies. This Administration looked at the treaty language and the negotiating record, because these were the bases upon which individuals had been arguing over the Treaty's meaning. These aspects of the Treaty are also central on the issue of good faith; we would never have needed to consider other elements if the record satisfied us that the Soviets had in fact agreed to the narrow interpretation.

3. What elements are you examining in your study of subsequent practice? What, in your judgment, would constitute an unambiguous finding with respect to subsequent practice?

Among other things, we are examining any public statements or writings by officials and negotiators of both countries, any communications after ratification by the two governments to their legislative bodies, any diplomatic conversations between the two governments, and other materials to the extent that they are of relevance to the ABM interpretation question. We are looking for evidence of how the two governments understood the Treaty, and how they applied it in practice in their defense programs and their diplomatic communications with each other.

These materials will not be free from ambiguities. We will do our best to draw reasonable conclusions from them, indicating the degree to which the various materials support one interpretation of the Treaty or another. I should also note that we are at a great disadvantage in this project, since the Soviet Union is a closed society and we cannot obtain much information as to what they actually believed prior to President Reagan's announcement of the SDI program.

Further, as you know, the Soviet Union has a well-known history of taking maximum advantage of ambiguities in agreements to which it adheres, and of refusing to be bound by any obligation or interpretation that it has not explicitly accepted. This has been documented over the years in a number of studies of Soviet compliance with international obligations. One study of Soviet treaty violations was noted during the ABM ratification period. See Report of House Foreign Affairs Committee, Sept. 27, 1961, "Background Information on the Soviet Union in International Relations," 118 Cong. Rec. 20723 (June 13, 1972) (copy attached). The Senate Judiciary Committee apparently completed another study shortly before May 1972, which was cited as having found that the Soviets had violated 24 of 25 agreements signed at recent summits. See remarks of Congressman Schmitz, 118 Cong. Rec. 23085-86 (June 28, 1972). A more recent compilation prepared for the President's General Advisory Committee on Arms Control and Disarmament is "One-Half Century of Soviet Compliance with Arms Control Agreements: 1958-1983" (Nov. 1983) (classified study).

4. No one has argued that the negotiating record is unambiguous with respect to testing of other physical principles. If, as is likely, you find ambiguities in the record of subsequent practice, what guidance would you provide the Senate with respect to weighing all the available evidence after April 30th?

The Senate will have to exercise its best judgment, as must the President, in weighing the various types of evidence that will have been amassed and analyzed at that point. Each piece of evidence must be assessed for its relative contribution toward understanding what the parties intended the Treaty to mean in this regard. In addition to strictly legal factors, prudential considerations will undoubtedly also weigh heavily in this overall judgment. Finally, the Senate will have to weigh the impact of any action it takes on the ongoing negotiation with the Soviet Union.

5. Much of the criticism of your work seems to be directed at what I would characterize as a strawman. Did you acknowledge, prior to the public criticism, that the memorandum in question was inadequate and incomplete, and was that memorandum the basis for the President's October 1985 decision?

I acknowledged the inadequacies of that memorandum as soon as I became aware of them, and long before Senator Nunn's recent statements on the Senate floor concerning the matter. The first indication I received of these problems came during questioning by Senators Nunn and Levin in a hearing before the Senate Armed Services Committee in November 1985. When it was brought to my attention during this hearing that one of the quotations in the memorandum was incomplete in a material way, I immediately said that that was wrong, and that if I had known at the time that this was the case, I would never have permitted it to happen.

I remedied these errors in the August 1986 memorandum that I submitted to Secretary Shultz (which has been provided to Senators). I acknowledged them in conversations and correspondence with Senators, including Senators Nunn and Levin.

In any event, as I stated in the March 26 hearing, the 1985 memorandum was never relied upon by the President in evaluating the broad interpretation, and it does not and never did represent the Administration's position.

PREPARED STATEMENT OF ABRAHAM D. SOFAER

I AM HONORED TO BE INVITED TO TESTIFY BEFORE THIS JOINT HEARING OF THE FOREIGN RELATIONS AND JUDICIARY COMMITTEES ON YOUR CONSIDERATION OF THE ABM TREATY AND ITS CONSTITUTIONAL IMPLICATIONS. I WOULD HAVE PREFERRED TO APPEAR AFTER MY STUDIES OF ISSUES RELEVANT TO THESE SUBJECTS WERE COMPLETE, AND I HOPE THESE COMMITTEES WILL INVITE ME TO RETURN AT THAT TIME. BUT I WELCOME THE INVITATION NONETHELESS, AND I WILL DO MY BEST TO ASSIST THE COMMITTEES IN THESE IMPORTANT DELIBERATIONS.

1. THE ABM TREATY REVIEW

I WILL BEGIN BY SUMMARIZING WHERE THE ADMINISTRATION STANDS IN THE PROCESS OF ANALYZING THE QUESTION OF THE APPLICATION OF THE ABM TREATY TO FUTURE ABM SYSTEMS OR COMPONENTS, OR WHAT ARE CALLED IN THE TREATY SYSTEMS OR COMPONENTS "BASED ON OTHER PHYSICAL PRINCIPLES" THAN THOSE USED IN THE ABM SYSTEM IN USE IN 1972.

IN 1985 I WAS ASKED TO PREPARE A LEGAL ANALYSIS OF THE TEXT AND NEGOTIATING HISTORY OF THE ABM TREATY WITH RESPECT TO THE DEVELOPMENT, TESTING AND DEPLOYMENT OF SUCH SYSTEMS.

ON THE BASIS OF THIS AND OTHER STUDIES OF THE TEXT AND NEGOTIATING HISTORY, PRESIDENT REAGAN CONCLUDED THAT A BROADER

INTERPRETATION OF THE TREATY WAS FULLY JUSTIFIED. AT THE TIME THE PRESIDENT ANNOUNCED THAT JUDGMENT IN 1985, HE ALSO ANNOUNCED THAT, AS A MATTER OF POLICY, HE WOULD NOT AT THAT TIME RESTRUCTURE THE SDI PROGRAM BASED ON THAT DETERMINATION. HE PROMISED TO CONSULT WITH CONGRESS AND THE ALLIES BEFORE MAKING ANY CHANGE IN THAT POLICY. THE ADMINISTRATION'S POSITION ON THE NEGOTIATING HISTORY IS CONTAINED IN THE CLASSIFIED AUGUST 1986 MEMORANDUM WHICH HAS BEEN PROVIDED TO THE SENATE.

EARLIER THIS YEAR, BEFORE CONSIDERING WHETHER TO RESTRUCTURE THE SDI PROGRAM, THE PRESIDENT CONCLUDED HE WOULD REQUIRE COMPREHENSIVE ANALYSES OF TWO OTHER ASPECTS OF THE TREATY INTERPRETATION QUESTION: THE SENATE'S RATIFICATION PROCEEDINGS; AND THE PARTIES' SUBSEQUENT PRACTICES. HE ORDERED MY OFFICE TO COMPLETE THESE STUDIES BY APRIL 30. TOGETHER WITH THE NEGOTIATING RECORD, THEY WILL ADD TO THE FOUNDATION FOR THE PRESIDENT'S DECISIONS ABOUT THE FUTURE OF THE SDI PROGRAM AND ITS RELATIONSHIP TO THE ABM TREATY.

IN HIS RECENT STATEMENTS ON THE SENATE FLOOR, SENATOR NUNN FOCUSED HIS CRITICISM ON A PRELIMINARY STUDY OF THE RATIFICATION PROCESS THAT WAS PREPARED BY MY OFFICE IN OCTOBER

1985 IN RESPONSE TO A REQUEST MADE IN A CONGRESSIONAL HEARING. AS SENATOR NUNN POINTED OUT, THAT MEMORANDUM WAS NOT COMPLETE AND OMITTED CERTAIN RELEVANT MATERIALS; THE ERRORS HE CITED HAD BEEN CORRECTED IN AUGUST 1986, BUT THIS STUDY OF THE RATIFICATION PROCESS WAS INADEQUATE. THIS IS A SERIOUS MATTER, BUT SHOULD BE KEPT IN PERSPECTIVE.

THAT MEMORANDUM AND ITS CONCLUSIONS WERE NEVER RELIED UPON BY THE PRESIDENT IN EVALUATING THE BROAD INTERPRETATION, AND IT DOES NOT REPRESENT THE ADMINISTRATION'S POSITION.

I AM PRESENTLY PREPARING WITH SEVERAL MEMBERS OF MY STAFF A COMPREHENSIVE STUDY OF THE RATIFICATION RECORD, AS WELL AS A STUDY OF THE SUBSEQUENT PRACTICE OF THE PARTIES. PERSONNEL FROM OTHER AGENCIES ARE ASSISTING IN THIS EFFORT. I WILL PERSONALLY REVIEW THIS MATERIAL AND SATISFY MYSELF THAT THE ANALYSES WE PRESENT ARE COMPLETE AND ACCURATE. WHEN THESE STUDIES ARE COMPLETE, I FULLY EXPECT THEY WILL BE SHARED WITH CONGRESS, SUBJECT TO WHATEVER ARRANGEMENTS MAY BE NECESSARY TO PROTECT CLASSIFIED MATERIAL.

THE PRESIDENT HAS PROMISED FULL CONSULTATIONS ON THIS ISSUE, WITH CONGRESS AND THE ALLIES, BEFORE MAKING UP HIS MIND AS TO WHAT ACTIONS ARE APPROPRIATE. HE IS WELL AWARE THAT, IN

THIS RESPECT AS IN ALL OTHER DEFENSE-RELATED MATTERS, HE NEEDS CONGRESS' SUPPORT ON A BIPARTISAN BASIS TO PROTECT THE NATION'S INTERESTS.

VIEWED IN LIGHT OF THESE UNPRECEDENTED STEPS, I QUESTION THE CHARACTERIZATION THAT THE PRESIDENT'S ACTIONS HAVE CREATED ANY KIND OF CONSTITUTIONAL CRISIS. HE HAS ANNOUNCED HIS BELIEF -- SHARED BY HIS SENIOR ADVISORS -- THAT THE SOVIETS NEVER COMMITTED THEMSELVES TO THE SO-CALLED NARROW INTERPRETATION. HOWEVER, THE PRESIDENT DECIDED NOT TO RESTRUCTURE THE SDI PROGRAM AT THAT TIME. MOREOVER, HE DECIDED IN AUGUST 1986 TO ADOPT THE UNPRECEDENTED STEP OF SHARING WITH THE SENATE OUR STUDY OF THE NEGOTIATING RECORD. IN FEBRUARY 1987, WHEN HE BEGAN SERIOUSLY TO CONSIDER THE POSSIBILITY OF RESTRUCTURING THE SDI PROGRAM, HE TOOK THE STEPS NECESSARY FOR FULL CONSULTATION WITH CONGRESS AND OUR ALLIES, TO BE COMPLETED PRIOR TO MAKING A DECISION. HE HAS INDICATED HIS INTENTION TO CONSULT FULLY WITH CONGRESS ON THE RESULTS OF THE STUDIES, INCLUDING THE LEGAL STUDY, AND OBTAIN THE JUDGMENTS OF LEGISLATIVE LEADERS, INCLUDING MEMBERS OF THESE DISTINGUISHED COMMITTEES.

THIS IS NOT A SCENARIO THAT SHOULD BE CHARACTERIZED AS A CONSTITUTIONAL CRISIS OR CONFRONTATION. RATHER, THE PRESIDENT IS MOVING CAREFULLY, AND IN FULL COOPERATION WITH CONGRESS, IN HIS CONSIDERATION OF A SENSITIVE AND IMPORTANT ASPECT OF HIS DUTIES.

2. ROLE OF THE RATIFICATION PROCESS IN TREATY INTERPRETATION.

IN MY REMARKS TODAY I THOUGHT I COULD BE MOST HELPFUL BY FOCUSING ON THE PROPOSED RESOLUTION OF MARCH 11, 1987, SUBMITTED BY THE SENATOR FROM DELAWARE. THAT RESOLUTION PROPOSES RULES FOR THE INTERPRETATION OF TREATIES GENERALLY, AND THEN OFFERS SPECIFIC CONCLUSIONS AS TO THE ABM TREATY IN PARTICULAR. MY STUDY WILL DEAL WITH THE CONCLUSIONS SUGGESTED FOR THE ABM TREATY. I CAN APPROPRIATELY COMMENT, HOWEVER, AT THIS TIME, ON THE GENERAL PRINCIPLES THE RESOLUTION PROPOSES.

LET ME SAY, AT THE OUTSET, THAT I FULLY AGREE WITH THE PROPOSITION EXPRESSED IN SECTION 2(1)(B) THAT "THE PRESIDENT MAY RATIFY ONLY THE TREATY TO WHICH THE SENATE ADVISED AND CONSENTED." THE TREATY POWER IS A SPECIAL ASPECT OF OUR CONSTITUTION. BUT IT IS SIMILAR TO OTHER ASPECTS OF THE CONSTITUTION THAT REFLECT THE FRAMERS' INTENTION TO HAVE A government of shared or mixed powers. The Senate and the President are partners in the treaty-making process, each having its own roles, but each needing the other's concurrence to act effectively. The statement by Professor Henkin in this connection -- that the President can only ratify the treaty to which the Senate consents -- is unobjectionable. The issue, always, in the context of our international obligations, is: What is that treaty to which the Senate advised and consented?

The key question posed by the Resolution is by what standards should the President, or the Senate, determine the meaning of a treaty ratified years before the issue of interpretation arises.

Likewise, the Resolution properly states that a treaty is a law, and that the President must take care that all laws, including treaties, be faithfully executed under Article II, section 3, clause 4 of the Constitution. Once again, however, the question remains what is the treaty, that is the law, that the President must faithfully execute? How is its meaning determined?

The Resolution before these Committees proposes several rules by which it would require such determinations to be made. Some of these rules are traditional standards, such as the proposition that the meaning of a treaty "is informed by reference to expressions of intent by the Senate . . . ." If anything, that language is an understatement. The Senate's power over the meaning of a treaty, during the process of advice and consent, is enormous -- its decisions and directions can be authoritative, when it chooses to exercise its power for that purpose.

The Resolution misstates the law, however, in at least two important respects. It is wrong, first, in the special weight it seeks to accord to what it defines as "Senate acquiescence in any interpretation communicated by the Executive." It is also wrong in attempting to mandate that, "to the extent the meaning of a treaty is clear" from how the Senate understands it and from the treaty's text, "anything not transmitted to the Senate" during the process of advice and consent, "including the negotiating record, is not relevant to the meaning of the treaty." These standards are inconsistent with established practice, and their adoption could have no effect internationally other than occasionally to bind the United States to standards of conduct which our treaty partners are

FREE TO IGNORE. MOREOVER, WHILE THESE STANDARDS MAY APPEAR TO PROTECT THE PREROGATIVES OF THE SENATE, THEY WOULD SERIOUSLY UNDERMINE THE CONSTITUTION'S REAL PURPOSE IN ASSIGNING TO THE SENATE THE POWER OF ADVICE AND CONSENT.

THE EFFECT OF RATIFICATION PROCEEDINGS ON THE INTERNATIONAL OBLIGATIONS OF THE UNITED STATES CAN BE, AND WAS INTENDED TO BE, PROFOUND. THE SENATE IS ABLE, IN A VARIETY OF WAYS, TO HAVE A POWERFUL -- EVEN DECISIVE -- IMPACT ON THE INTERNATIONAL OBLIGATIONS OF THE UNITED STATES. THE SENATE HAS THE POWER TO DECIDE IN EACH INSTANCE JUST HOW FAR IT WISHES TO GO IN ESTABLISHING THE MEANING OF A TREATY ON ANY QUESTION OF INTEREST TO THE SENATE. IN EACH INSTANCE, THE SENATE ACTS, NOT MERELY TO PROTECT ITS OWN PREROGATIVES, BUT AS A PARTNER WITH THE PRESIDENT IN FORMING AN INTERNATIONAL CONTRACT. A TREATY IS A LAW, AND IN SOME RESPECTS IT HAS PURELY DOMESTIC EFFECTS THAT LEAD TO ITS BEING APPLIED IN THE WAY ANY LAW IS APPLIED. BUT A TREATY IS ALSO MORE THAN A LAW. IT IS AN INTERNATIONAL CONTRACT, AND THE SENATE IS AS RESPONSIBLE AS THE PRESIDENT FOR MAKING SURE THAT THE CONTRACTS MADE IN BEHALF OF THE U.S. ARE MUTUALLY ENFORCEABLE AND DO NOT CREATE UNILATERAL DUTIES.

In implementing its important powers, therefore, over the meaning of treaties, the Senate has developed a set of practices to ensure that the Senate's determinations and opinions have the same degree of binding effect on our treaty partners as they do upon the United States. Thus, the Senate acts to incorporate its proposed interpretations as amendments, reservations, understandings, or other conditions in the Senate's resolution of ratification. The resolution of ratification is the document by which the Senate formally grants advice and consent, and it typically requires the President to take appropriate action in connection with ratification to ensure that the other party is officially informed of the Senate's input on the terms of the international contract, and is mutually bound.

In the case of a bilateral treaty, the practice of the Executive Branch has generally been to seek the express agreement of the other party to all the conditions in the Senate's resolution of ratification which affect the rights and obligations of the parties. The Executive then incorporates all such conditions into the U.S. instrument of ratification. The Senate is well aware of the importance of this process, and has occasionally concerned itself in great detail with the

PRECISE MANNER IN WHICH THE EXECUTIVE BRANCH WOULD ENSURE THAT OUR TREATY PARTNERS ARE LEGALLY BOUND WITH RESPECT TO THE SENATE'S UNDERSTANDINGS OR CONDITIONS.

IN THE CASE OF THE PANAMA TREATIES, FOR EXAMPLE, THE SENATE CONDITIONED ITS ADVICE AND CONSENT ON A SERIES OF AMENDMENTS, RESERVATIONS, UNDERSTANDINGS AND OTHER CONDITIONS, SOME OF WHICH ADDRESSED THE MEANING OF TREATY PROVISIONS.
THE SENATE'S RESOLUTIONS OF RATIFICATION REQUIRED THAT THE PRESIDENT INCLUDE IN THE U.S. INSTRUMENTS OF RATIFICATION ALL OF THE CONDITIONS IN THE SENATE'S RESOLUTIONS, AND THAT CERTAIN OF THESE CONDITIONS BE INCLUDED IN BOTH THE U.S. AND PANAMANIAN INSTRUMENTS, OR IN A BILATERAL AGREEMENT CALLED A PROTOCOL OF EXCHANGE TO BE SIGNED BY THE TWO PARTIES AT THE TIME OF RATIFICATION.

IN CONSIDERING THE SALT II TREATY, THE SENATE FOREIGN RELATIONS COMMITTEE DECIDED THAT THE SENATE SHOULD SPECIFY EXPLICITLY WHAT WAS REQUIRED BY THE PRESIDENT FOR ALL CONDITIONS. IT PROPOSED A THREE-PART RESOLUTION OF RATIFICATION: FIRST, PROVISIONS THAT DID NOT REQUIRE FORMAL NOTICE TO OR AGREEMENT BY THE SOVIET UNION, INCLUDING A FEW INTERPRETIVE STATEMENTS AND A NUMBER OF INTERNAL INSTRUCTIONS

TO THE EXECUTIVE BRANCH; SECOND, PROVISIONS THAT WOULD BE FORMALLY COMMUNICATED TO THE SOVIET UNION PRIOR TO RATIFICATION AS THE OFFICIAL POSITION OF THE UNITED STATES, INCLUDING A NUMBER OF INTERPRETIVE STATEMENTS;

AND THIRD, PROVISIONS THAT WOULD REQUIRE THE EXPLICIT AGREEMENT OF THE SOVIET UNION PRIOR TO RATIFICATION, CONCERNING THE LEGAL STATUS OF CERTAIN ASSOCIATED DOCUMENTS.

THE COMMITTEE REPORT INDICATED THAT THE PRESIDENT WOULD BE BOUND VIS-A-VIS THE SENATE WITH RESPECT TO THE CONDITIONS IN ALL THREE CATEGORIES, BUT THAT THE THREE CATEGORIES DIFFERED WITH REGARD TO THEIR EFFECT ON THE SOVIET UNION. WITH RESPECT TO THE THIRD CATEGORY, THE COMMITTEE RECOGNIZED THAT EVEN THE FORMAL INCLUSION OF THE CONDITIONS IN THE U.S. INSTRUMENT OF RATIFICATION MIGHT BE INSUFFICIENT TO BIND THE SOVIET UNION, AND THAT THE SENATE SHOULD THEREFORE REQUIRE THE PRESIDENT TO OBTAIN EXPRESS SOVIET AGREEMENT.

THESE EXAMPLES AND OTHERS FROM THE PRACTICE OF THE TWO BRANCHES ILLUSTRATE THAT THE SENATE MAY, THROUGH ITS RESOLUTION OF RATIFICATION, OBLIGE THE PRESIDENT TO ACT TO ENSURE THAT THE OTHER PARTY IS LEGALLY BOUND TO AN INTERPRETATION OF TREATY TERMS.

THEY ALSO SHOW THAT THE SENATE IS FULLY AWARE THAT THE PROPER AND EFFECTIVE WAY TO BIND TREATY PARTNERS IS TO SECURE THEIR EXPRESS WRITTEN AGREEMENT TO CONDITIONS OR OTHER TERMS. IN THE ABSENCE OF EXPRESS AGREEMENT, SOME DEGREE OF DOUBT WILL ALWAYS EXIST AS TO WHETHER THE OTHER PARTY IS LEGALLY BOUND TO AN INTERPRETATION, EVEN WHEN IT IS CONTAINED IN THE SENATE'S RESOLUTION AND THE U.S. INSTRUMENT OF RATIFICATION. FINALLY, THIS PRACTICE REFLECTS THAT, BY IMPLICATION, OUR TREATY PARTNERS ARE NOT BOUND BY INTERPRETATIONS AS TO WHICH THEY ARE NOT GIVEN FORMAL NOTICE PRIOR TO RATIFICATION.

THE FUNDAMENTAL IMPORTANCE GIVEN TO THE SENATE'S EXPLICIT, FORMALLY COMMUNICATED UNDERSTANDINGS IS ALSO CLEARLY SUPPORTED IN LAW. THE VIENNA CONVENTION ON THE LAW OF TREATIES PROVIDES THAT TREATIES MUST BE INTERPRETED "IN GOOD FAITH IN ACCORDANCE WITH THE ORDINARY MEANING TO BE GIVEN TO THE TERMS OF THE TREATY IN THEIR CONTEXT AND IN LIGHT OF ITS OBJECTS AND PURPOSE."

SENATE ADDITIONS TO A RATIFICATION INSTRUMENT OFTEN CONSTITUTE THE TERMS OF A TREATY; AT TIMES, THE SENATE REWRITES A TREATY'S TERMS TO MAKE IT ACCEPTABLE. WHERE THE U.S. FORMALLY COMMUNICATES THE SENATE'S CONDITIONS, RESERVATIONS, OR

UNDERSTANDINGS, WHICH ARE NOT "TERMS" STRICTLY SPEAKING, THEY CLEARLY CONSTITUTE AN IMPORTANT PART OF THE "CONTEXT" IN WHICH THE TREATY'S TERMS MUST BE CONSTRUED AND ITS PURPOSES ASCERTAINED.

IN SHARP CONTRAST TO SENATE ACTIONS THAT ARE CONTAINED IN THE RESOLUTION OF RATIFICATION AND FORMALLY COMMUNICATED TO TREATY PARTNERS, INTERPRETATIONS OF A TREATY MERELY DISCUSSED BEFORE, OR PRESENTED BY EXECUTIVE WITNESSES TO, THE SENATE IN GENERAL HAVE FAR LESS WEIGHT IN THE PROCESS OF TREATY INTERPRETATION. THIS DOES NOT MEAN THAT SUCH INTERPRETIVE STATEMENTS HAVE NO PROBATIVE VALUE ON THE ISSUE OF THE TREATY'S INTERNATIONAL MEANING AND EFFECT.

THEIR PROBATIVE VALUE FOR THIS PURPOSE, HOWEVER, IS FAR LESS CERTAIN THAN STATEMENTS PLACED IN RATIFICATION RESOLUTIONS, AND DEPENDS UPON A VARIETY OF FACTORS, INCLUDING THE DEGREE TO WHICH THE SENATE EVIDENCED AN INTENT TO ADOPT THE INTERPRETATION AS A CONDITION TO ITS ASSENT TO THE TREATY, WHETHER AND THE MANNER IN WHICH THE TREATY PARTNER IS PUT OFFICIALLY ON NOTICE OF SUCH STATEMENTS, AND THE EXTENT AND MANNER IN WHICH THE TREATY PARTNER RESPONDS.

HOW THE RECORD OF INTERNAL RATIFICATION PROCEEDINGS FITS

INTO THE SCHEME OF THE VIENNA CONVENTION ON TREATIES IS UNCLEAR. THE INTERNAL RATIFICATION PROCEEDINGS OF ONE OF THE PARTIES TO A TREATY MAY SHED LIGHT ON THAT PARTY'S UNDERSTANDING OF THE MEANING INTENDED BY ITS TERMS AND THE OBJECT AND PURPOSE OF THE TREATY.

STANDING ALONE, HOWEVER, SUCH PROCEEDINGS WOULD NOT APPEAR TO BE PART OF THE CONTEXT OF A TREATY, OR THE MATERIALS CITED IN ARTICLE 31.

SUCH EVIDENCE MIGHT, HOWEVER, QUALIFY UNDER ARTICLE 32 AS "SUPPLEMENTARY MATERIALS", AND APPEAR TO HAVE BEEN TREATED AS SUCH BY VARIOUS SCHOLARS. ASSUMING THAT INTERNAL RATIFICATION RECORDS ARE, AT BEST, "SUPPLEMENTARY" MEANS OF INTERPRETATION, THEY ARE THEREFORE NO HIGHER IN STATUS IN THE INTERPRETATION OF TREATIES FOR INTERNATIONAL PURPOSES THAN THE NEGOTIATING RECORD.

THE CONVENTION DOES NOT INDICATE WHAT RELATIVE PROBATIVE WEIGHT SHOULD BE GIVEN TO RATIFICATION PROCEEDINGS; PRESUMABLY THIS WOULD DEPEND ON THEIR CONTENT, SIGNIFICANCE, AND ALL OTHER RELEVANT CIRCUMSTANCES. BUT THE CONTENT OF SUCH PROCEEDINGS MUST ALWAYS BE CONSIDERED WITH CAUTION, IN THAT THEY REFLECT THE VIEWS EXPRESSED IN THE INTERNAL PROCESSES OF ONLY ONE OF THE PARTIES.

The American Law Institute's Restatement of Foreign Relations Law of the United States generally repeats the principles of the Vienna Convention.

Section 325 of the revised Restatement, and the official commentary to that section, note that this treatment under international law differs somewhat from the approach ordinarily taken by U.S. courts in determining the domestic legal effect of international agreements. U.S. courts tend to take greater account of internal U.S. materials, such as committee reports and debates, than would be the case in the determination of international obligations. But the process of determining what the U.S. is obliged to do internationally is very different, and internal discussions are accorded far less authority in that context than conclusions of the Senate communicated by the Executive to the other party.

The November 1977 Senate Foreign Relations Committee memorandum, The Role of the Senate in Treaty Ratification, draws this clear distinction between the effect of ratification proceedings on U.S. international obligations, as opposed to U.S. domestic law. It states that:

. . . The Committee reports, although purely domestic documents and of no concern to other parties, have value to the Executive and Judicial Branches in interpreting the intent of the Senate. They serve as legislative history in the event questions should arise over the meaning of a treaty. Statements and colloquies by the floor manager of a treaty serve a similar purpose.

This characterization of internal ratification proceedings, for the purpose of determining international obligations, as "purely domestic documents" of "no concern to other parties" is an accurate appraisal, except where, in a particular case, the U.S. Government acts formally to communicate such matters to the other party. In such a case, an interpretation communicated to the other party, while not binding, could have probative weight in determining what the parties intend, depending on the manner in which the statement is communicated and the response (if any) made by the other party.

This is why the Senate has regularly insisted upon incorporating its serious concerns into the resolution of ratification.

THE SENATE HAS REPEATEDLY REFUSED TO RELY ON THE RECORD OF ITS ADVICE-AND-CONSENT PROCEEDINGS ALONE AS THE BASIS FOR ESTABLISHING AUTHORITATIVE INTERPRETATIONS OF THE INTERNATIONAL ASPECTS OF TREATIES.

FOR EXAMPLE, THE FOREIGN RELATIONS COMMITTEE'S REPORT ON THE GENOCIDE CONVENTION, REFERRING TO THE FORMAL CONDITIONS THAT IT RECOMMENDED BE INCLUDED IN THE SENATE'S RESOLUTION OF RATIFICATION, STATED THAT:

> THE SENATE'S CONDITIONS, TOGETHER WITH THE TREATY AND ITS ACCOMPANYING DOCUMENTS, DESCRIBE IN FULL THE OBLIGATION OF THE UNITED STATES IN RATIFYING THE TREATY. TO INSURE AN IDENTITY OF EXPECTATIONS BY ALL PARTIES CONCERNING THE RIGHTS AND OBLIGATIONS IMPOSED BY THE TREATY, EACH PARTY SHOULD BE ACCORDED FORMAL NOTICE OF THE SENATE'S CONDITIONS. . . .

THE INTERESTS OF THE UNITED STATES WOULD BE DISSERVED BY ADOPTING THE RESOLUTION'S TREATMENT OF THE WEIGHT TO BE ACCORDED TO STATEMENTS MADE IN THE INTERNAL RATIFICATION PROCEEDINGS.

THE U.S. PRESENTLY REGARDS ITSELF AS HAVING NO DUTY TO MONITOR, OR RESPOND TO, STATEMENTS MADE IN THE RATIFICATION

PROCEEDINGS OF OTHER NATIONS, UNLESS THE STATEMENTS ARE FORMALLY COMMUNICATED. IF THE U.S. WERE CHARGED WITH KNOWING WHAT WENT ON DURING SUCH INTERNAL PROCEEDINGS, WE WOULD, AMONG OTHER THINGS, HAVE TO DETAIL LEGALLY AND TECHNICALLY TRAINED PERSONNEL TO OBSERVE SUCH PROCEEDINGS, MAKE JUDGMENTS ABOUT LEGAL AND CONSTITUTIONAL SYSTEMS WITH WHICH WE ARE NOT FAMILIAR, AND IN MANY CASES INTRODUCE A VISIBLE U.S. PRESENCE IN DOMESTIC BODIES OF OTHER COUNTRIES THAT MIGHT HAVE NEGATIVE POLITICAL CONSEQUENCES.

SUCH A PRACTICE WOULD MAKE NO SENSE, MOREOVER, BECAUSE WE COULD NOT SUCCESSFULLY INSIST THAT OTHER NATIONS MONITOR AND RESPOND TO STATEMENTS AT RATIFICATION HEARINGS IN THE U.S. SENATE. LIKE THE U.S., OTHER STATES DO NOT REGARD THEMSELVES AS OBLIGED TO FOLLOW OUR DOMESTIC ACTIVITIES. THEY RELY UPON THE WRITTEN INSTRUMENTS AND OTHER FORMAL COMMUNICATIONS AS THE PROPER MEANS FOR CONVEYING THE VIEWS OF THE UNITED STATES ON THE MEANING OF TREATIES. IN ANY EVENT, WE COULD NOT PRESS SUCH A VIEW WITHOUT ACCEPTING A COMPARABLE OBLIGATION WITH RESPECT TO THEIR PROCEEDINGS.

OTHER, SOUND REASONS EXIST FOR AVOIDING THE RULE SUGGESTED BY THE RESOLUTION UNDER CONSIDERATION THAT WOULD PLACE GREAT

WEIGHT UPON WHAT IT DESCRIBES AS THE SENATE'S "UNDERSTANDING" AS INFORMED BY REFERENCE TO "SENATE ACQUIESCENCE IN ANY INTERPRETATION COMMUNICATED BY THE EXECUTIVE." STATEMENTS IN RATIFICATION PROCEEDINGS WILL VARY IN THE AUTHORITY WITH WHICH THEY ARE ENTITLED TO BE VIEWED, AND EACH NATION WILL HAVE ITS OWN SET OF VALUES IN THIS REGARD.

THE IMPORTANCE WHICH THE SENATE ATTACHES TO PARTICULAR STATEMENTS WILL ALSO VARY, AND WILL OFTEN BE SPECULATIVE. TO INFER SENATE APPROVAL FROM "ACQUIESCENCE", MOREOVER, WOULD BE A DANGEROUS PRACTICE, AND CERTAINLY ONE WITH NO SOUND EMPIRICAL BASIS. EXPERIENCE SHOWS THAT THE SENATE DEALS IN GENERAL, IN AN AUTHORITATIVE MANNER, ONLY WITH WHAT IT MUST DEAL, OR WITH WHAT IT WANTS TO DEAL. THE SENATE, AS A BODY, OFTEN FORMS NO JUDGMENT -- OF APPROVAL OR ACQUIESCENCE -- ON MATTERS IT IS PRESENTED, ESPECIALLY WHEN THEY ARE RELATIVELY MINOR CONCERNS IN A TREATY'S CONSIDERATION.

FOR THESE REASONS IT IS ESSENTIAL TO JUDGE THE EVIDENTIARY VALUE OF RATIFICATION PROCEEDINGS, IN THE CONTEXT OF DETERMINING INTERNATIONAL OBLIGATIONS, BY REFERENCE TO THE DEGREE TO WHICH THEIR SUBSTANCE IS FORMALLY COMMUNICATED TO THE FOREIGN GOVERNMENT IN QUESTION, AND THE MANNER IN WHICH THE FOREIGN GOVERNMENT RESPONDS.

WITH RESPECT TO MATTERS ON WHICH THE SENATE HAS NOT ACTED, AND ON WHICH THE EXECUTIVE HAS COMMUNICATED WITH THE TREATY PARTNER, THE WEIGHT TO GIVE SUCH SUPPLEMENTARY MATERIALS, IF ANY, SHOULD BE FAR LESS THAN THE WEIGHT GIVEN TO MATTERS ON WHICH THE SENATE HAS ADOPTED A VIEW WHICH HAS BEEN FORMALLY COMMUNICATED. FURTHERMORE, THESE MATERIALS MUST BE SUBJECTED TO THE NORMAL, CAREFUL EVALUATION TO WHICH ANY FORM OF LEGISLATIVE HISTORY IS SUBJECTED. MATERIALS OF THIS SORT SHOULD NOT BE GIVEN A PARTICULAR LEGAL STATUS, AS THE PROPOSED RESOLUTION SUGGESTS, AND IN PARTICULAR SUCH MATERIAL SHOULD NOT BE GIVEN ANY GREATER IMPORTANCE THAN IT IS PRESENTLY ACCORDED UNDER ESTABLISHED PRINCIPLES OF INTERNATIONAL AND DOMESTIC LAW.

3. THE PRESIDENT'S DISCRETION IN INTERPRETING TREATIES

THE RESOLUTION UNDER CONSIDERATION GIVES TOO LITTLE RECOGNITION TO THE PRESIDENT'S SUBSTANTIAL DISCRETION IN THE INTERPRETATION OF TREATIES.

THE PRESIDENT HAS THIS POWER PURSUANT TO HIS RESPONSIBILITIES TO ENFORCE THE LAWS AND TO CONDUCT THE FOREIGN AFFAIRS OF THE UNITED STATES. U.S. COURTS TYPICALLY GIVE GREAT DEFFRENCE TO THE MANNER IN WHICH THE EXECUTIVE BRANCH INTERPRETS A TREATY.

Where a question of interpretation has not been resolved by an express condition in the Senate's resolution of ratification, the President has the latitude to consider all relevant interpretive materials and to reach a lawful decision that maximizes the interests of the U.S. and its citizens. Of course, the President cannot and should not disregard views expressed during Senate proceedings, which are of considerable importance. This Administration has never said otherwise. But this nation has developed an allocation of powers, and a set of practices, concerning treaty interpretation that work well and should not be abandoned over a particular controversy on all aspects of which the President wishes to work closely with the Senate.

Subsection (2)(C) of the proposed Resolution seeks to limit the President's power of interpretation by stating generally that, to the extent the meaning of a treaty is clear under subparagraphs (A) and (B), anything not transmitted to the Senate at such time, including the negotiating record, is not relevant to the meaning of the treaty. This evidently means that if the Senate had an internal understanding on a particular point, then the negotiating record, the subsequent

PRACTICE OF THE PARTIES, AND LATER INTERPRETIVE AGREEMENTS BETWEEN THE PARTIES ARE ALL IRRELEVANT. THIS WOULD, OF COURSE, BE FUNDAMENTALLY UNACCEPTABLE TO ALL OF OUR TREATY PARTNERS, AND WITH GOOD REASON. WE CANNOT UNILATERALLY INTERPRET TREATIES BASED ON THE UNCOMMUNICATED AND UNCONSENTED UNDERSTANDING OF ONE OF OUR INTERNAL BRANCHES OF GOVERNMENT. WE WOULD NOT ACCEPT ANY SUCH EFFORT BY ANOTHER NATION.

THE ONLY PRACTICAL EFFECT OF THE RULES PROPOSED IN THE RESOLUTION WOULD BE FOR THE SENATE OF THE UNITED STATES TO LIMIT THE PRESIDENT OF THE UNITED STATES TO A LEGISLATIVELY MANDATED MEANING OF A TREATY, IRRESPECTIVE OF WHAT THE TREATY REALLY MEANS, AND WHAT A TREATY PARTNER MAY BE FREE TO CLAIM THE TREATY MEANS. THE UNITED STATES WOULD BE PUT AT A SIGNIFICANT DISADVANTAGE IF THE PRESIDENT IS SUBJECT TO STRICTER CONSTRAINTS, AS A RESULT OF INTERNAL UNDERSTANDINGS OF THE SENATE, THAN THOSE WHICH APPLY TO OTHER PARTIES. NEITHER THE SENATE NOR THE PRESIDENT SHOULD HAVE ANY INTEREST IN DEPRIVING OUR NATION OF THE BENEFITS OF MUTUALITY-OF-OBLIGATION IN ITS TREATY RELATIONS.

WE FULLY RECOGNIZE THE IMPORTANCE THE SENATE ATTACHES TO EXECUTIVE COMMUNICATIONS. WE PARTICULARLY RECOGNIZE THAT

COMMUNICATIONS BEARING ON LEGISLATION OR TREATY-MAKING ARE RELIED UPON BY LEGISLATORS, AND THAT CONGRESS HAS A RIGHT TO RELY ON SUCH STATEMENTS.

AT THE SAME TIME, HOWEVER, HUMAN EXPERIENCE DEMONSTRATES THAT ERRORS SOMETIMES OCCUR, PEOPLE SOMETIMES EXAGGERATE, AND MISUNDERSTANDINGS TAKE PLACE. BUT THE SENATE HAS AMPLE REMEDIES FOR THESE DANGERS, WHICH CAN BE USED WITHOUT PREJUDICING U.S. INTERESTS IN ITS INTERNATIONAL RELATIONS. THE SENATE CAN, OF COURSE, AND DOES INCLUDE IN ITS RESOLUTION OF RATIFICATION THOSE MATTERS WHICH ARE FUNDAMENTAL TO ITS WILLINGNESS TO GRANT ADVICE AND CONSENT, AND WHICH HAVE NOT BEEN ADEQUATELY RESOLVED BY AGREEMENT BETWEEN THE PARTIES. THE SENATE CAN ALSO INSIST ON BEING ADEQUATELY INFORMED ON ISSUES DURING THE TREATY RATIFICATION PROCESS. REQUESTS WERE TENTATIVELY ADVANCED DURING CONSIDERATION OF THE ABM TREATY, FOR INSTRUCTIONS AND THE NEGOTIATING RECORD, BUT THEY WERE NOT PRESSED. SENATOR JACKSON AT ONE POINT MENTIONED THAT THE STATE DEPARTMENT HAD PROMISED AN ANALYSIS OF THE TREATY, AND SUCH AN ANALYSIS WAS IN FACT PREPARED, BUT A LEGAL ANALYSIS WAS NOT FORMALLY REQUESTED OR PROVIDED.

Where issues of treaty interpretation arise on which the Senate takes a strong interest, the President and the Senate must work together in good faith to resolve such questions in a manner that, consistent with the Constitution and international law, maximizes the interests of the United States. This requires active cooperation and mutual accommodation, in a process in which neither branch has absolute authority to control the outcome. Our Constitution is complicated because of the uncertainties it leaves, and the overlapping powers it confers. But it works, whereas the apparently simple solution described in S. Res. 167 will not work. It would create chaos in the applicable law, and would have no international effect, beyond prejudicing the United States by depriving us of the right to insist in some cases on mutuality of obligation.

In evaluating the Senate's constitutional prerogatives, moreover, the Senate should evaluate all the implications of giving binding effect to the statements of Executive officers on the meaning of a treaty.

The Senate, of course, is entitled to full and fair presentations by Executive officials on the meaning of every aspect of treaties under Senate consideration. The Senate's

INTEREST IN FULL AND FAIR PRESENTATIONS, HOWEVER, IS TO INFORM ITSELF OF THE TREATY THAT WAS ACTUALLY MADE. WHEN IT GIVES ITS ADVICE AND CONSENT TO A TREATY, IT IS TO THE TREATY THAT WAS MADE, IRRESPECTIVE OF THE EXPLANATIONS IT IS PROVIDED. THE SENATE SHOULD NOT ADOPT RULES THAT WOULD IN EFFECT ENABLE EXECUTIVE OFFICERS TO TRANSFORM (FOR THE U.S.) THE TREATY OBLIGATIONS ACTUALLY NEGOTIATED. THAT RESULT WOULD, IN FACT, FAR MORE SERIOUSLY UNDERMINE THE SENATE'S ROLE THAN THE POSSIBILITY THAT THE SENATE MAY FROM TIME TO TIME BE INADEQUATELY INFORMED ON A MATTER THAT WAS INSUFFICIENTLY IMPORTANT TO LEAD THE SENATE TO ISSUE SOME FORM OF QUALIFICATION ON ITS FORMAL ADVICE AND CONSENT TO RATIFICATION.

PREPARED STATEMENT OF ABRAM CHAYES

Mr. Chairman and Members of the Committees:

I have not appeared before these Committees in some years, and it is a great pleasure and honor to be before you again. In my view, you are performing a real service in the undertaking on which you are embarked -- a full review of the evidence and arguments concerning the proper interpretation of the ABM Treaty as it applies to permitted testing of space-based components and systems. The effort is of great importance, not only to establish the true meaning of this Treaty, but for the arms control enterprise as a whole and for the long term health of our constitutional system, which, wisely I believe, establishes a partnership in treaty-making between the President and the Senate. The 200th anniversary of our Constitution is not the time to abandon that partnership.

As a contribution to the work of the Committees, I want first to present for the record a letter to you signed by four former Legal Advisers to the Department of State. These State Department lawyers, going back to Ernest Gross in the Truman administration, all agree that the traditional interpretation of the Treaty, as banning testing and development in space of ABM systems and components "based on other physical principles" is the correct one. The letter rehearses at some length many of the arguments you have already heard, so I will not read it. I request that it be included in the record of these hearings.

Mr. Chairman, you have heard a great deal about the negotiating record and the ratification record of the ABM Treaty. You have had live, eye-witness testimony on the consistency of the negotiating history with the traditional interpretation of the treaty.

The ratification record is public and reveals the understanding on the basis of which those who had the responsibility -- and it is a solemn official responsibility -- presented the Treaty to the Senate, answered questions and worked to secure support for it. These men did not testify in vague generalities. They were asked specific questions on the very point here in issue, and they gave carefully considered replies, as our Harvard Law Review article and Senator Nunn's Report show.

To advance a new interpretation, so different from that presented to the Senate in 1972, is to assert that the men who testified before this body -- Secretary of State

Rogers, Secretary of Defense Laird, Director of Defense Research and Engineering Foster and the Chiefs of Staff, all of them -- were either dupes or were deliberately deceiving the Senate. There is not a scintilla of evidence before you that such a deceit could or did take place, with or without the complicity of this distinguished group of senior officials.

But I am primarily an international lawyer. From the viewpoint of international law, the intricacies of U.S. constitutional practice, while interesting and important, are not central for treaty interpretation. International law, on the whole, does not place great weight on legislative history of any kind. There are reasons for this. Legislative history does not bulk as large in other legal systems as it does in ours. Most other countries do not have the elaborate stenographic records of committee proceedings and floor debate that we do. It hit a very responsive chord for me, as a former State Department official, to read Senator Nunn's description of a negotiating record as "a disjointed collection of cables and memoranda," none of which has been submitted to public scrutiny, or even seen by the other side.

> There is no single document or even set of documents that constitutes an official negotiating history. There is no transcript of the proceedings. Instead what we have is a variety of documents of uneven quality -- some of them precise, some of them well-structured, some of them done hastily, some of them simply notes in the margin.

Moreover, a negotiation like this one takes place in phases over many months. Positions of the parties shift and evolve over time. The draftsmen try out different formulas at different times in an effort to capture the meaning of the parties. It is not possible to draw meaning from any particular episode or interchange, torn from the context of the negotiations as a whole.

Neither the Legal Adviser nor the Soviets can stick a thumb into this melange, pull out a reporting telegram or memorandum and say "This is what the treaty means. We had our fingers crossed when we signed the document."

It is for these very reasons that international lawyers focus their attention on the text of the treaty. Indeed, even among U.S. lawyers there is an old saw that when the legislative history is ambiguous, you look to the language of the statute. That is what I would like to do this morning: refocus our attention on the text of the Treaty, on the actual language to which the United States and the Soviet Union solemnly bound themselves. I believe, and I think you will too, that the text constitutes the most powerful and unanswerable statement of the interpretation that we all have embraced for the last 15 years.

First let's look at Article V of the Treaty itself. What does it say?

> Each party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.

That seems to be plain enough English. It says that the parties cannot test or develop or deploy anti-ballistic missile systems or components in space.

Mr. Sofaer, however, says that the words "ABM systems or components" has a special meaning in this Treaty. He argues that, although the Treaty is expressed to be of indefinite duration, it covers only ABM systems using the primitive technology that was available in 1972.

The term ABM system is defined in the Treaty, however, and the definition precludes the limiting interpretation Mr. Sofaer wants to put on it. Article II of the Treaty says:

> For the purpose of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of:
>
> (a) ABM interceptor missiles . . . :
>
> (b) ABM launchers . . . ; and
>
> (c) ABM radars.

(emphasis added).

This is, first, a generic definition of an ABM system in terms of its function -- countering strategic ballistic missiles or their elements in flight trajectory. It describes, by the way, the components of which such systems "currently" consist. The word "currently" is a descriptive not a limiting term. What is the point of saying "currently" unless you want the definition to cover technologies not yet in use.

In his first presentation of his new theory before the Arms Control Subcommittee of the House Foreign Affairs Committee in October, 1985, Mr. Sofaer said that we should not worry too much about that word "currently" or the comma before it. We should just read the Treaty as though there were an "and" there. But the draftsmen of the Treaty did not use an "and" there. Even if they had, I don't see how it would have changed the generic definition into a limiting one.

We know that the word "currently" was inserted in the text of Article II toward the end of the negotiations to resolve the drafting problems in making the Treaty applicable to exotic systems. Until that point, there was an agreed text of Article II that read:

> For the purposes of this Treaty, an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, consisting of
>
> (a) ABM missiles . . . ;

(b) ABM launchers . . . ; and

(c) ABM radars . . . ."

Now that is a limiting definition. It clearly confines ABM systems covered by the Treaty to those using the then-current technology. If that is what the negotiators wanted to accomplish, they already had ideal language to do so. There is no imaginable purpose for deliberately inserting the word "currently" except to ensure that the definition would not be given that kind of limiting construction. It is inescapable that the Article II definition is generic and functional, covering all systems to intercept ballistic missiles or their elements in flight trajectory, whatever technology they might employ.

The other two relevant portions of the Treaty are Article III and Agreed Statement D. Here again, a textual analysis supports the reading of Article V as a comprehensive prohibition against testing, development or deployment of space-based exotic systems.

Article III, as amended by the 1974 Protocol, limits deployment of ABM systems to one fixed, land-based site on each side. As you know, we have not exercised our option, while the Soviets have. Article III starts out with a broad prohibition: "Each party undertakes not to deploy ABM systems or their components except [as permitted in the Article]." In other words, Article III is structured to prohibit all deployments except those specified therein. Subparagraphs (a) and (b) limit the deployment at the single permitted site in terms of area, fire power and radar capability. Since Article III, the only Article in the Treaty permitting any ABM deployment speaks in terms of conventional 1972 technology, deployment of systems based on other physical principles at the permitted sites is implicitly barred.

Now let us look at Agreed Statement D.

> In order to ensure the fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers and ABM radars are created in the future, specific limitations on such systems and their components will be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty.

The inducing clause "In order to ensure the fulfillment of the obligation . . . in Article III" tells us that this Statement is directed toward deployment of fixed land-based systems, the subject matter of Article III. One of the functions of an Agreed Statement is to clarify or make express something that is only implicit in the Treaty. As we have seen, Article III, to which Agreed Statement D is addressed, prohibits by implication the deployment of exotic systems at the permitted ABM sites. Agreed Statement D makes explicit the prohibition that is otherwise derived only by negative inference from the Treaty language.

According to Mr. Sofaer, however, the Agreed Statement had no such modest function. His position is that after two years of tough negotiations resulting in fifteen carefully drafted Articles, the parties, at the last minute and in the form of an Agreed Statement rather than a provision in the body of the Treaty, imposed a major new limitation on deployment, to be found nowhere else in the text.

If we accept Mr. Sofaer's view, it means that until Agreed Statement D was added in the closing phase of the negotiations, not only space-based exotic systems, but sea-based, air-based and mobile land-based as well, could be freely tested, developed and deployed under the Treaty.

Indeed it means that, again until the last minute addition of Agreed Statement D, the Treaty would have allowed exotic systems to be deployed anywhere except at the fixed land-based ABM sites permitted on each side, which, as shown above, was confined to conventional technology. I submit that such a construction is nonsensical in the literal sense of the word.

That leads to a broader point. Mr. Sofaer's interpretation controverts the manifest purpose of the Treaty, and indeed leaves it without any intelligible purpose whatsoever. In Article I of the Treaty, "[e]ach party undertakes to limit anti-ballistic missile systems" and "not to deploy ABM systems for a defense of the territory of its country." Why wasn't that enough? Why didn't the Treaty stop there? What more was needed?

The United States was not prepared to accept a simple limitation on deployment, because that would leave the other side free to develop and test systems to the brink of deployment without violating the Treaty. At that point, it could "break out" of the Treaty, by exercising its withdrawal right or simply repudiating the Treaty, and face us with a deployed system.

Almost every provision after Article I of the Treaty is designed to deal with the breakout problem. Thus, Articles II and V deal not only with deployment, but with testing and development. Article VI addresses upgrading of air defenses. Other provisions deal with multiple warhead and rapid reload ABMs. Early warning radars are limited so that they cannot provide the base for a battle-management system. The Treaty deals with the breakout problem comprehensively by pushing the line of permissible activity back from the point of deployment as far as possible, consistently with verification requirements.

Mr. Sofaer would have us believe that this preoccupation with breakout applied only to systems using 1972 model-T technology. According to his analysis, it did not reach systems based on other physical principles. As far as the Treaty is concerned, he says, it is all right to space test lasers, particle beams, prototypes of components and even integrated systems using these devices, regardless of the breakout possibilities. The Treaty was not concerned with limiting such activity, he says, even though it would be clearly observable, verifiable and dangerous. Does anyone think that is a sensible interpretation of the Treaty?

I invite you, Mr. Chairman and members of the Committees, to ask yourselves what would have happened if, in October 1985, the Soviet Union had proposed this new interpretation for the first time, and blithely announced that they proposed to conduct such tests in space. What would the reaction of the administration have been to that? What would your reaction have been?

I think it has already become apparent that this new interpretation was derived by a process that does not meet professional standards. In his letter to Senator Nunn, Mr. Sofaer acknowledged that the previous studies of the ratification record he presented to the Congress "did not provide a complete portrayal of the ratification proceedings" and "was not comprehensive." He added "I did not review this material personally."

What would we say of the senior partner in a law firm who made such a defense after the advice given to a client proved faulty? What would we say of a judge who advanced this justification after an opinion was reversed on appeal?

In this case, the consequences are potentially much graver than bad advice in a corporate deal or an erroneous judicial opinion. The United States has publicly and officially endorsed a position of central importance to arms control and to U.S.-Soviet relations in general. Our compliance with our pledged word on fundamental issues of national security is at stake. The integrity of the constitutional treaty-making process has been called in question.

This step was taken without consulting Congress or the allies. The conclusion was reached without inquiring of the many distinguished members of the negotiating delegation who are outside of government. It was done for one reason and one reason only: to free the SDI program from the strictures of the Treaty. It was thought necessary because, as Mr. Perle told the House Military Affairs Committee, under those limitations, it would be impossible to explore the SDI technology to the point where an intelligent deployment decision could be made.

We all like to be "can do" lawyers. I did myself when I was in the position Mr. Sofaer now holds. But sometimes the most important thing a "can do" lawyer can do is to tell his client "You can't do that."

These Committees now have a grave responsibility. It goes beyond merely correcting an erroneous conclusion as to the meaning of the Treaty. Shakespeare's lawyer was one who could "make the worse appear the better cause." When lawyers speak for the government of the United States they must be held to a higher standard. In the field of international law, the discipline of judicial review is often, as in the present situation, unavailable to enforce this higher standard. The responsibility for review in this case, therefore, devolves upon these Committees and the Senate, and can be met by adopting the Resolution before you. In so doing, you will also ensure that the Senate's role as partner in the treaty-making process is vindicated, and that the United States remains true to its international obligations.

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

THIS MORNING THE SENATE FOREIGN RELATIONS AND JUDICIARY COMMITTEES BEGIN A SECOND DAY OF HEARINGS ON THE 1972 ABM TREATY. ON MARCH 11, 1987, THESE COMMITTEES HEARD IMPORTANT AND PROBING TESTIMONY FROM WITNESSES, SOME OF WHOM DEFENDED THE BROAD AND SOME THE NARROW VIEW OF THE TREATY. SINCE OCTOBER, 1985 WHEN THE ADMINISTRATION CIRCUMSCRIBED THE INTERPRETATION ISSUE IN CLARIFYING THAT A REVIEW OF THE ABM TREATY RESULTED IN A CONCLUSION FAVORING A BROAD INTERPRETATION, THE ISSUE OF THE PROPER INTERPRETATION OF THE TREATY HAS BEEN RAISED INTO PARTICULAR FOCUS AND A SUBJECT OF HEATED DEBATE. CERTAINLY IT IS OF TREMENDOUS IMPORTANCE WHETHER THE "BROAD" VIEW OF THE TREATY, WHICH DEFINES ABM SYSTEMS AND COMPONENTS IN TERMS OF 1972 TECHNOLOGY, OR THE "NARROW" VIEW, WHICH EMPHASIZES THE FUNCTION OF THE ABM SYSTEM, IS ADOPTED.

ON THE LST DAY OF HEARINGS, TESTIMONY WAS RECEIVED WHICH IS PARTICULARLY SIGNIFICANT TO AN EXAMINATION OF THE CONSTITUTIONAL ADVISE AND CONSENT ROLE OF THE SENATE IN RATIFICATION OF A TREATY; SPECIFICALLY, WE MUST QUESTION WHAT IT MEANS FOR THE SENATE TO GIVE ITS ADVISE AND CONSENT TO THE PRESIDENT'S MAKING OF A TREATY IN THIS CONTEXT. I GREATLY APPRECIATE THE PRESENCE OF THESE KNOWLEDGEABLE WITNESSES AND I AM CERTAIN WE WILL BENEFIT GREATLY FROM THEIR TESTIMONY.

JOINT PREPARED STATEMENT OF ABRAM CHAYES AND ANTONIA H. CHAYES

Mr. Chairman and Members of the Committees:

Professor Chayes is in Cambridge teaching class this morning and could not appear before you. I am grateful for the opportunity to appear before the Committees to present our joint statement on the proper interpretation of the ABM Treaty, a subject on which we have spoken and written widely. I will also be glad to answer questions.

In our view, these Committees are performing an important service in undertaking a full review of the evidence and arguments about the proper interpretation of the ABM Treaty as it applies to development and testing of SDI components and systems. Your work will have an important impact beyond the ABM Treaty, on conduct under arms control regimes generally and in deepening public understanding of the constitutional partnership between the President and the Senate in treaty-making. The 200th anniversary of our Constitution is not the time to abandon that partnership.

Mr. Sofaer, the State Department Legal Adviser, posed the central question addressed by the Biden resolution and in this hearing: "[B]y what standards shouuld the President, or the Senate, determine the meaning of a treaty ratified years years before the issue of interpretation arises[?]" (Sofaer statement, p. 7). The first answer to that question lies in the text of the treaty. There we find the language to which the President, the Senate and the Soviet Union all agreed. And that is where we are directed to look by international law. Article 31 of the 1969 Vienna Convention on the Law of Treaties, accepted by the United States as reflecting customary international law and incorporated in the new Restatement of Foreign Relations Law, states as the "general rule of interpretation":

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

1.

So what we would like to do first this morning is to refocus attention on the text of the Treaty. The overall scheme and the language of its specific provisions embody in no uncertain terms the traditional and historic interpretation. The ABM Treaty prohibits development, testing and deployment of space-based ABM systems using 1972 technology or any other that might be developed thereafter.

Article V of the Treaty, the core of the interpretation issue, is unambiguous and straightforward.

> Each party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.

Mr. Sofaer argues, however, that the words "ABM systems or components" cover only systems using 1972 technolog (even though the Treaty is expressed to be of indefinite duration). He purports to find such a limitation in the Treaty's definition of ABM systems in Article II:

> For the purpose of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of:
>
> (a) ABM interceptor missiles . . . ;
>
> (b) ABM launchers . . . ; and
>
> (c) ABM radars.

(emphasis added).

On the contrary, this definition is the mainstay of the tradition interpretation. It is a generic definition of an ABM system in terms of its function -- countering strategic ballistic missiles or their elements in flight trajectory. Article II goes on to describe the components of current ABM systems. The word "currently" makes it clear that this description is an illustration of the generic definition, not a limitation. Otherwise it would nmake no sense to use the word.

In his first presentation of the reinterpretation before the Arms Control Subcommittee of the House Foreign Affairs Committee in October, 1985, Mr. Sofaer said:

> Article II can be more reasonably read to mean that the systems contemplated by the treaty are those that serve the faunction and that currently consist of the listed components.

In other words, do not worry too much about that word "currently" or the comma before it and add an "and" to the text. But the draftsmen of the Treaty carefully chose its words. From Dr. Garthoff, the delegation secretary, and other sources, we know exactly why the word "currently" was inserted in the text of Article II. It was done toward the end of the negotiations to resolve specific drafting problems and to record the understanding of both parties that the Treaty applied to exotic systems that might be developed in the future. It establishes clearly the intention to employ a functional defintion, covering all systems whose function is to intercept ballistic missiles or their elements in flight trajectory, whatever technology they might employ.

Textual analysis of other treaty provisions bolsters the common sense reading of Article V as a comprehensive prohibition against testing, development or deployment of space-based exotic systems. Article III, as amended by the 1974 Protocol, limits deployment of ABM systems to one fixed, land-based site on each side. It starts with a broad prohibition: "Each party undertakes not to deploy ABM systems or their components except [as permitted in the Article]." It thus prohibits all deployments except those specified therein. Subparagraphs (a) and (b) describe the deployment at the single permitted site in terms of 1972-type launchers, missiles and radars, limited in area, fire power and radar capability. Since, by the terms of the Article everything not specifically permitted is prohibited, any deployment of systems based on other physical principles is implicitly barred at the permitted sites.

Now let us look at Agreed Statement D.

> In order to ensure the fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers and ABM radars are created in the future, specific limitations on such systems and their components will be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty.

The inducing clause "In order to ensure the fulfillment of the obligation . . . in Article III" tells us that this Statement is directed toward the permissible fixed land-based systems. A major function of Agreed Statements is to clarify or make express something that is only implicit in the Treaty. Agreed Statement D makes explicit the prohibition on deployment of exotic systems that is otherwise derived only by negative inference from the Treaty language.

According to the Legal Adviser, however, the Agreed Statement had no such modest function. He would have us believe that an Agreed Statement, tacked on at the end of a two-year treaty negotiation imposed a new, far-reaching substantive prohibition. If he is right, until that late moment, not only space-based exotic systems, but sea-based, air-based and mobile land-based systems as well, could be freely tested, developed and deployed under the Treaty. Even more absurd, it means that again until the last minute, the Treaty would have allowed exotic systems to be deployed everywhere *but at the fixed land-based ABM sites permitted by Article III to each side*, which, as shown above, was confined to conventional technology.

Mr. Sofaer's interpretation not only controverts the express purpose of the Treaty, but leaves it without any intelligible purpose whatsoever. Article I of the Treaty states that "[e]ach party undertakes to limit anti-ballistic missile systems" and "not to deploy ABM systems for a defense of the territory of its country." But if Agreed Statement D was an afterthought, two years of hard negotiation and 15 articles would have left the Soviets in a position where they could "break out" of the Treaty without even exercising the withdrawal right, because testing and deployment of systems embodying emerging technologies would have been freely permitted.

Accounts of the negotiations show that the U.S. negotiators were constantly concerned about break-out and drew the line of permissible activity as far back as possible from the point of deployment. Articles II(2) and V deal not only with deployment, but also with testing and development. Article VI addresses U.S. concerns that air defenses might be upgraded to ABM-capable systems. Other provisions prohibit multiple warhead and rapid reload ABMs. Early warning radars are limited so that they cannot provide the base for a battle-management system.

Mr. Sofaer proposes that U.S. negotiating concerns with Soviet breakout applied only to their 1972 systems, and ignored systems based on other physical principles that could be developed in the future.

We invite you, Mr. Chairman and members of the Committees, to imagine what the U.S. reaction would have been if the Soviet Union had first proposed this reinterpretation of the Treaty, and blithely announced that it proposed to conduct such tests in space.

II.

Mr. Chairman, you have heard a great deal about the the ratification record of the ABM Treaty, and we will spend only a few moments on it now. The ratification record is public. The Secretary of State and other senior executive branch officials, in presenting the Treaty to the Senate, stated their understanding of the meaning of the Treaty. That understanding reflects "the ordinary meaning to be given to the terms of the Treaty." It was fully comprehended by the Senators who heard or read these presentations. They asked precise and detailed questions to which they got precise and detailed answers. All this is set forth in detail, with appropriate citations, in our Harvard Law Review article and Senator Nunn's comprehensive and scholarly report on the ratification record. At the last hearing, Senator Biden drew attention to the conclusion of the colloquy between Senator Jackson and John Foster, Director of Defense Research and Engineering. After a clear exposition of the Treaty prohibition against spaced based testing and development of exotic systems, Senator Jackson stated unequivocally, "I understand." That understanding was consistently adhered to by the United States without not challeng from the Soviet Union until October 1985, when Mr. Sofaer abruptly unveiled his "reinterpretation."

Against this background, let us revert to Mr. Sofaer's question: "[B]y what standards should the President, or the Senate, determine the meaning of a treaty ratified years years before the issue of interpretation arises[?]" (Sofaer statement, p. 7).

Of course, as he says, the President has authority to interpret a treaty. Section 321 of the Revised Restatement of Foreign Relations Law says:

> The President has authority to interpret international agreements for purpose [sic] of U.S. foreign relations since he is the 'sole organ' of the United States in its international relations and is responsible for carrying out agreements with other nations. . . . The Senate, whose consent is necessary before the United States can conclude a treaty, has no part in the implementation of the treaty after it is made, but understandings expressed by the Senate in the process of giving its advice and consent have to be respected.

There is no debate on this point.

The real issue is by what authority this President presumes to alter the well-settled interpretation, endorsed by his three immediate predecessors, corresponding to the representations made by the Executive to the Senate at the time of ratification, clearly understood by the Senate and consistent with the actions and public statements of the parties over thirteen years of practice.

According to Mr. Sofaer, the solemn statements of the senior responsible cabinet officers communicated to the Senate as a basis for its advice and consent, understood and agreed to by the Senate in committee hearings and floor devbate, acted on continuously since then until 1985, and fully consistent with the language of the Treaty have "some probative value" on issues of treaty interpretation -- but not very much. (Sofaer Statement, pp. 16-17, 25). Unless the Senate gets it in writing -- in the form of a reservation or understanding -- its participation in the treaty process as mandated by the Constitution is illusory except for the final vote. A future President can ignore the representations of his predecessor and the understanding of the Senate. from departing from that understanding.

Mr. Sofaer's discussion of the law of "reservations" and "understandings," is unexceptionable but inapplicable to the present case. Of course if the Senate has any serious question about the meaning of the language of a material provision, it will introduce a formal understanding (sometimes called an interpretation), clarifying the matter. According to the 1978 Senate Foreign Relations Committee Memorandum cited by Judge Sofaer,

> An understanding is a statement which is not intended to modify or limit any of the provisions of the treaty in its international operation but is intended merely to clarify or explain or deal with some other matter incidental to the operation of the treaty in a manner other than a substantive reservation.1

(Reprinted in 1978 Whiteman at 693-694).

The absence of such an understanding here indicates that the Senate felt no need to "clarify or explain or deal with" any matter "incidental to the operation of the treaty." Both the meaning and the operation of the treaty were clear from its text.

And where the Senate wishes to change the meaning of the text presented by the President, it will do so by means

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1 According to Whiteman, although only reservations -- defined as statements purporting to modify or limit the effect of the treaty -- need be communicated to the other party, "in the case of a bilateral treaty it is the invariable practice, prior to making of arrangements for the exchange of ratifications and sometimes even prior to ratification of the treaty, for the government making [any] statement or declaration to notify the other government thereof in order that the latter may have an opportunity to accept, reject, or otherwise express its views with respect thereto. 14 Whiteman at 188-189.

of a reservation, incorporated in the resolution of advice and consent.

> A reservation is a form of declaration by a state, when signing, ratifying, or adhering to a treaty, which modifies or limits the substantive effect of one or more of the treaty provisions as between the reserving state and other states party to that treaty.

(*Id.* This passage paraphrases the explanation of a reservation given in 14 Whiteman at 137-138; see also Comment a. to Restatement 313).

Where, as here, the Senate had no intention of modifying or limiting the substantive effect of the ABM Treaty as written, there was no occasion for a reservation.

The discussion of the Panama Canal Treaty and SALT II in Mr. Sofaer's Statement shows how very sophisticated and sensitive the Senate is in its use of these instruments to resolve disputed issues of treaty interpretation or to require renegotiation of the treaty commitment initially accepted by the Executive. And it is certainly true that when the Senate uses these devices, they are binding as to the meaning of the treaty.

But none of this tells us what the Senate is to do when, as in the case of the ABM Treaty, there is no dispute about the meaning of the text and no wish to change the meaning. The very *absence* of reservations or understandings itself confirms that the Senate understood the treaty to be susceptible of only one interpretation -- the one that emerges from the plain meaning of the text and was confirmed by representatives of the Executive at the time of ratification. What is impoertant about ratification history of *this* Treaty is that it shows there was no issue of interpretation. Everyone agreed.

To say that in such a case the President need not consider the Senate understanding of the treaty as revealed by the ratification record -- that only a formal understanding in the resolution of advice and consent will do -- is to stand the Constitution on its head.

Not surprisingly, Mr. Sofaer's prescription does not reflect U.S. constitutional law and practice. Section 314 of the Revised Restatement of Foreign Relations Law is entitled: "Reservations and Understandings: Law of the United States." Comment d. to that section 314, on "Understandings," -- which, with the familiar penchant for selective quotation, Mr. Sofaer failed to cite -- provides:

> If no . . . [formal] statement [of understanding] is made, indication in the record that the Senate ascribed a particular meaning to the treaty is relevant to the interpretation of the treaty by a United States court in much the same way that the legislative history of a statute is relevant to its interpretation. (Cross-references omitted.)
>
> Although the Senate's resolution of consent may contain no statement of understanding, there may be such statements in the report of the Senate Foreign Relations Committee or in the Senate debates. In such case, the President must decide whether they represent a general understanding by the Senate and if he finds that they do, must respect them in good faith.

In this case the hearings, the debates and the entire tenor of the ratification proceedings "represent a general understanding by the Senate" supporting the traditional interpretation. In accordance with the partnership in treaty making established by the Constitution, the President is bound, "to respect it in good faith."

Mr. Sofaer ignores these well-established principles by purporting to address how the international obligations of the United States are to be determined, rather than the requirements of the Constitution on which these Committees are properly focussed. It is true that the Restatement concerns itself somewhat more fully with the ratification record than does the Vienna Convention. That is a reflection in part of the general tendency in this country to give more weight to legislative history than do other legal systems. More important, it reflects and accommodates the special role of the Senate in the treaty making process, which is unique in this country.

It would be wrong to suppose, however, that the interpretative practice under the United States Constitution leads to very different results than the practice under international law codified in the Vienna Convention. The United States could hardly have conducted a successful foreign policy for two hundred years if that were the case. Any difference is one of nuance rather than a fundamental divergence in approach. After all, what is being sought is the meaning of a text. Precepts or maxims of interpretation are, as all lawyers know, not rules, but only guidelines in this quest. The interpreter seeks illumination wherever it is to be found. The Vienna Convention itself permits reference to legislative materials in the "Supplemental rule of Interpretation" described in Article 32. In three of the six contentious cases in which the United States has appeared in the International Court of Justice, the Legal Adviser has relied on the ratification record in urging a particular interpretation of a treaty. We would suppose that if the Senate proceedings are persuasive on the World Court they should be at least equally so for the President. See, e.g., Memorial of the United States in United States v. Iran, [1980] I.C.J. Reports 41-42.

The system prescribed by the Legal Adviser is not only unsound in law. It would be unworkable in practice. Mr. Sofaer's proposal implies that the Senate has an affirmativwe obligation to state how it interprets every provision of every treaty. The resolution of ratification would have to include an endless series of understandings and interpretations about matters that were not in dispute in order to ensure that a President, 15 years later, would not be free to disregard the unambiguous and agreed meaning of the text.

The burden of such an absurd procedure would not fall on the Senate alone. It would rebound back on the President and limit his capacity to negotiate treaties because of the necessity of reviewing with the treaty partners the plethora of understandings and reservations produced by the Senate. Instead of a partnership between the Executive and the Senate, as the Constitution intended, the treaty making process would degenerate into an adversary relationship.

III.

Not only does Mr. Sofaer ignore materials in the ratification record that he is duty-bound to consider in interpreting a treaty. In the last analysis, he bases his interpretation on material that is inadmissible both under the Constitution and at international law -- the so-called "negotiating record."

We put these words in quotation marks because there really is no such thing as a negotiating record, in the sense that we have a legislative record of public committee hearings, reports and debates on bills and other legislative acts, or in the sense of the "preparatory work" to a treaty, referred to in Article 32 of the Vienna Convention, consisting of preliminary drafts, documentary exchanges and records of debate.

What Mr. Sofaer calls the "negotiating record" is aptly described by Senator Nunn in his report to the Senate as "a disjointed collection of cables and memoranda," none of which has been submitted to public scrutiny, and most of which have not been seen by the other side.

> There is no single document or even set of documents that constitutes an official negotiating history. There is no transcript of the proceedings. Instead what we have is a variety of documents of uneven quality -- some of them precise, some of them well-structured, some of them done hastily, some of them simply notes in the margin.

Moreover, a negotiation like this one takes place over many months and years. Positions of the parties shift and evolve over time. The draftsmen try out different formulas at different times in an effort to capture the intentions of the parties. It is not possible to draw meaning from any particular episode or interchange, torn from the context of the negotiations as a whole. Neither the Legal Adviser nor the Soviets can stick a thumb into this Christmas pie, pull out a plum in the form of a reporting telegram or memorandum and say "This is what the treaty really means. We had our fingers crossed when we presented it to the Senate."

The unreliability of such evidence has long been recognized at international law. See 14 Whiteman 390, citing 1 Shwarzenberger, International Law 514-15 (3d ed. 1957).

In our Harvard Law Review article, we raised the question whether it is consistent with the constitutional role of the Senate in treaty making to rely for the meaning of the text on a secret record that was never disclosed to or relied on by the Senate. We believe it is not. Professor Tribe, perhaps the pre-eminent contemporary constitutional law scholar, agreed with that position in his testimony here.

In any case, to advance a new interpretation based on the secret negotiating record so different from the meaning presented to the Senate in 1972, is in effect to assert that the responsible officials who testified before this body -- the Secretary of State, the Secretary of Defense, the Director of Defense Research and Engineering, the Chiefs of Staff -- were dupes or were deliberately deceiving the Senate. Indeed, that is what Mr. Sofaer sometimes implies. There is not a scintilla of evidence that any such deception could or did take place, with or without the complicity of this distinguished group of men.

IV.

Reliance on secret records and disrespect for distinguished public servants are part and parcel of the lack of professionalism that has characterized the entire process by which the President's new interpretation of the ABM Treaty has been arrived at.

Mr. Sofaer acknowledged in his letter to Senator Nunn that the studies of the ratification record presented to the Congress "did not provide a complete portrayal of the ratification proceedings" and "was not comprehensive." He added "I did not review this material personally."

What would we say of the senior partner in a law firm who made such a defense after the advice given to a client proved faulty? What would we say of a judge who advanced this justification after an opinion was reversed on appeal?

In this case, the consequences are potentially much graver than bad advice in a corporate deal or an erroneous judicial opinion. The United States has publicly and officially endorsed a reinterpretation of a central obligation of the arms control regime of major importance to U.S.-Soviet relations in general. Our compliance with our pledged word on fundamental issues of national security is at stake. The integrity of the constitutional treaty-making process has been called in question.

This step was taken without consulting Congress or the allies. The conclusion was reached without discussion with the many distinguished members of the negotiating delegation now outside of government. It was done for one reason and one reason only: to free the SDI program from the strictures of the Treaty. It was thought necessary because, as Mr. Perle told the House Armed Services Committee, under those limitations, it would be impossible to explore the SDI technology to the point where an intelligent deployment decision could be made. I am told that Kenneth Adelman, the Director of ACDA, made a similar statement in Boston yesterday.

We all like to be "can do" lawyers. Abe did when he was Legal Adviser, and I demanded no less of my lawyers when I was Under Secretary of the Air Force. But there are times when even a "can do" lawyer must tell the client "You can't do that."

Shakespeare's lawyer was one who could "make the worse appear the better cause." When lawyers speak for the government of the United States they must be held to a higher standard. In the field of international law, the discipline of judicial review is often, as in the present situation, unavailable to enforce this higher standard.

Therefore, these Committees have a grave responsibility. It goes beyond merely correcting an erroneous conclusion as to the meaning of the Treaty. It can be met by adopting the Resolution before you. That resolution accurately expresses the relationship established by the Constitution between the Senate and the President in the adoption of treaties. And it reflects the essential principles of international law on treaty interpretation.

It is regrettable that such a resolution has become necessary in a case like this. The ABM Treaty is the only bilateral arms control agreement in full force and effect between the United States and the Soviet Union. It is simple in concept. The original understanding of its meaning was clear. The parties have worked reasonably well under it for almost fifteen years.

In adopting the Resolution, you will not only vindicate the Senate's role as partner in the treaty-making process. You will be defending the last remnant of a larger regime of agreements that holds promise of reducing nuclear arsenals and curbing the competition in arms between the Soviet Union and the United States.

PREPARED STATEMENT OF ARTHUR W. ROVINE, ESQ.

I am honored to testify before you today on questions of treaty interpretation and on the proposed Senate Resolution 167.

I am here to testify only as regards principles of treaty interpretation, and not on the ABM Treaty or on arms control generally. I am currently a Partner at the international law firm of Baker & McKenzie in New York City, but I speak to you as a former Assistant Legal Adviser for Treaty Affairs in the State Department, a post I held for six years, followed by two years as the first United States Agent to the Iran-U.S. Claims Tribunal in The Hague.

My first concern regarding the issues which form the subject of these hearings is that far too much is being made of the lawyers' debate as to the proper interpretation of the ABM Treaty. As a treaty lawyer, I think it fair to say that interpretations or reinterpretations of treaties long in force are normally inappropriate approaches for decision-making on questions of fundamental public policy, especially basic issues of strategic doctrine and arms control that have been with us for many years.

The decision whether or not or how to pursue the President's Strategic Defense Initiative is not a matter that should engage the energies of lawyers, but rather those who are expert in arms control and strategic doctrine. In my judgment, the nation has got to decide on fundamental policy in this area, and the proper treaty and statutory law should follow suit. I am concerned that a prolonged debate on details of this or that aspect of the negotiating record of the ABM Treaty might trivialize the central issue facing the nation on this matter. The question is not basically a matter of Executive or Senate prerogatives, or what weight is to be given to this or that detail of the negotiating record.

I believe the central policy considerations must be debated openly and decisions made which are then reflected in the law, both treaty and statute. We make our treaties to follow policy decisions, and not to precede them. In a sense, Mr. Chairman, I regret that it was felt necessary to have any debate on principles of treaty interpretation in the context of the ABM Treaty and that the issue of Executive and Senate prerogatives has become part of a national debate on strategic doctrine. The two subjects go together rather badly, and I think we should do our best to keep them apart.

Having said that, I am nevertheless asked for my view concerning the proposed Senate Resolution 167. The first point that strikes a treaty lawyer in the discussion to date is the short shrift accorded to subsequent practice in the interpretation of treaties. Both the Executive Branch presentations and the proposed Senate Resolution 167 address primarily the negotiating record and the ratification process in order to determine the proper meaning of a treaty. But this emphasis is mistaken.

Under Article 31 of the Vienna Convention on the Law of Treaties, a treaty is to be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. The term "context" for this purpose, in addition to the text of the treaty itself, includes agreements or instruments agreed to by the parties in connection with the conclusion of the treaty. But there is also to be taken into account any subsequent agreement between the parties regarding its interpretation or application, and, most importantly, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

If these sources of guidance still leave the meaning of the treaty ambiguous or obscure, or lead to a result which is unreasonable, then pursuant to Article 32 of the Vienna Convention, recourse may be had to what are called supplementary means of interpretation. These include the preparatory work of the treaty and the circumstances of its conclusion.

In other words, you reach the negotiating record and the ratification process of a treaty as a means of interpreting its meaning when you have reviewed subsequent practice along with the text and found that the meaning is ambiguous or obscure. This may be a very different process from statutory interpretation, but that's how it's done with treaties, according to the Vienna Convention.

Yet, the emphasis in the ABM Treaty debate has been on the negotiating record (and not necessarily an agreed negotiating record) and the ratification process. My view is that in accordance with the Vienna Convention and proper rules of interpretation, those are not the first or primary sources of guidance we look to in trying to determine the meaning of a treaty. It makes more sense and is in accordance with the rules to examine subsequent practice at least along with the negotiating record. The practice to be examined would cover the period from the entry into force of the treaty to the date the question of the treaty's meaning was raised.

In many treaties, as in much legislation, there are certain ambiguities in the negotiating record and in the legislative history. Treaty lawyers have long understood that how the parties apply a treaty in practice may be far more persuasive evidence of their intent as to the meaning of that treaty than words exchanged in the negotiations and in the ratification process. One reason why subsequent practice serves as a primary rather than a supplementary means of interpretation is that we have a different executive branch today from the one that negotiated the treaty, and we have a different Senate from the one that gave its advice and consent to ratification. Furthermore, in interpreting a treaty, behavior in applying that treaty over time may well be more persuasive than words, even in negotiation or ratification, which only describe the treaty.

If the proper emphasis is accorded to subsequent practice, then it would seem clear that certain provisions of S.Res.167 need to be amended. Section 2 of the Resolution, subparagraph (B) provides that a treaty is properly interpreted by reference to its text, as reasonably construed, in light of its context and object and purpose. This is appropriate as far as it goes, but is incomplete since it makes no reference to subsequent practice.

Subparagraphs (A) and (C) and Section 8, subparagraph (1) also require some change for a few reasons, the first of which I will give here and the others in a few moments. These subparagraphs focus only on the negotiating process, the ratification process, and on interpretations communicated to the Senate by the Executive. Once again, these are appropriate sources in terms of making decisions concerning the proper interpretation of a treaty, but they ignore the subsequent practice of the parties. To that extent, they are misstatements of treaty law.

Next, Mr. Chairman, in reviewing the debate I have been struck by the fact that the role of the Judiciary has been largely ignored. Clearly, the meaning of a treaty is what the Supreme Court of the United States determines the treaty to mean. The Judiciary is the ultimate arbiter of what any law of this land means, despite the fact that the Judiciary was not involved in the negotiation of the treaty and was not involved in the approval process. That is true with respect to any law.

Thus, if taken at face value, the statement in Section 2, subparagraph (2)(A) that "the meaning of that treaty is what the Senate understands the treaty to mean when it gives its advice and consent" is not correct. It may be unlikely that the courts will be in a position to express their authoritative view as to the meaning of the treaty, but it is certainly not impossible.

Much as Senator Goldwater was held to have standing in his lawsuit against President Carter and Secretary of State Vance for the termination of the Mutual Defense Treaty with Taiwan without Senate advice and consent (Senator Goldwater pleaded that he had been deprived of his right to vote), so too, if a Senator believes that a treaty other than the one he voted to approve is being implemented by the President, then he may have standing to pursue his case in the courts.

The Goldwater case took less than one year from start to finish, from the District Court through the Supreme Court, and I believe it could be done as quickly in this case as well. I am not suggesting that a Senator will get the result he wants, however, nor am I suggesting that litigation is the best way to resolve disputes of this kind, especially in light of the very substantial political content of the questions involved. But I cite the role of the Judiciary here to indicate that the apparent turf battle between Executive and Senate as to the meaning of a treaty appears to be based upon the mistaken notion that the views of the one or the other are authoritative. That is not true. In the end, it is the view of the Supreme Court that counts with respect to the meaning of any law.

Finally, Mr. Chairman, assuming that we do wish to focus only on the supplementary means of interpretation, such as the negotiating record and the ratification process, and assuming further there is no authoritative determination by the Judiciary as to the meaning of a treaty, we come to the Executive - Senate debate on treaty powers which so unfortunately and unnecessarily forms the core of the questions before us today.

In this narrow context, it is necessary to examine the difficulties raised by the distinction between treaty as the domestic law of the land, and treaty as a legal relationship between two countries. For purposes of the international law side of any treaty relationship, our treaty partners cannot be expected to examine too closely our internal processes, and we would certainly not feel bound to inquire too closely into theirs. Under international law, the primary question is what the two executives have agreed to - what is the meaning of the treaty or agreement they have concluded. Under international law, the executives talk to each other and not to the parliaments or the legislatures of their treaty partners.

At the same time, the Executive Branch and the Judiciary may not, in my judgment, properly rely on a secret negotiating record that is substantially inconsistent with the fundamental and accepted meaning of a treaty. If the meaning of a treaty could be derived from secret negotiating records which are substantially inconsistent with fundamental and accepted meanings of the treaty the Senate debated and approved, then Senate advice and consent to ratification would not have any meaning, and the Executive could not fairly say to its treaty partner that the Senate had given its advice and consent to ratification.

But these problems only bring us back to subsequent practice as a primary and perhaps the best means of interpretation. A consistent, subsequent practice accepted by both parties and accepted by the Senate over the years (until a question is finally raised) will give us an interpretation of the treaty that overcomes ambiguities, if any, in the negotiation and ratification processes. If the subsequent practice is clear, and if both the Executive and the Senate have accepted that practice without objection, then we no longer have the issue of an inconsistent understanding with the Senate on the one hand and the foreign treaty partner on the other at the time of the negotiation or conclusion of the treaty. Given an accepted subsequent practice, the treaty partner, the Executive and the Senate have all been in agreement as to the meaning of the treaty. The key players are all aboard the same treaty, and have been over a period of years.

If, on the other hand, the subsequent practice is ambiguous or inconsistent, then there may be a serious problem between the two governments as to the meaning of the treaty, and further negotiation might be necessary between the two governments.

Mr. Chairman, if there is to be a Senate resolution on this subject, I would hope that its text would take into account the foregoing views. But returning to my original concern, I would hope that the examination of fundamental strategic doctrine in this country would go forward on the basis of policy considerations, and that once there is a consensus on what we wish to do in this area, the appropriate legal arrangements will follow.

Thank you Mr. Chairman.

LETTER FROM GERARD C. SMITH

March 9, 1987

President Ronald W. Reagan
The White House
Washington, D.C. 20500

Dear Mr. President:

In view of the current debate over the proper interpretation of the 1972 Anti-Ballistic Missile Treaty, I think you will be interested in the enclosed statement by six former Secretaries of Defense.

Respectfully,

Gerard C. Smith

Ambassador Gerard C. Smith

Enclosure

Copies to: Secretary George P. Shultz
Secretary Caspar W. Weinberger
Hon. Howard H. Baker, Jr.
Hon. Frank C. Carlucci
Hon. Robert C. Byrd
Hon. Robert J. Dole
Hon. Sam Nunn
Hon. John W. Warner
Hon. Clairborne Pell
Hon. Jesse A. Helms
Hon. James C. Wright
Hon. Robert H. Michel
Hon. Les Aspin
Hon. William L. Dickinson
Hon. Dante B. Fascell
Hon. William S. Broomfield

1616 'H' Street, N.W., Suite 400
Washington, D.C. 20006

March 9, 1987

STATEMENT BY FORMER SECRETARIES OF DEFENSE ON THE ABM TREATY

We reaffirm our view that the ABM Treaty makes an important contribution to American security and to reducing the risk of nuclear war. By prohibiting nationwide deployment of strategic defenses, the Treaty plays an important role in guaranteeing the effectiveness of our strategic deterrent and makes possible the negotiation of substantial reductions in strategic offensive forces. The prospect of such reductions makes it more important than ever that the U.S. and Soviet governments both avoid actions that erode the ABM Treaty and bring to an end any prior departures from the terms of the Treaty, such as the Krasnoyarsk radar. To this end, we believe that the United States and the Soviet Union should continue to adhere to the traditional interpretation of Article V of the Treaty as it was presented to the Senate for advice and consent and as it has been observed by both sides since the Treaty was signed in 1972.

Hon. Harold Brown
Hon. Melvin R. Laird
Hon. Elliot L. Richardson
Hon. Clark M. Clifford
Hon. Robert S. McNamara
Hon. James R. Schlesinger

USSR INTERNATIONAL AFFAIRS

CHERVOV INTERVIEWED ON REAGAN ABM DECISION

AU021345 Bratislava PRAVDA in Slovak 29 Apr 83 p 6

[Unidentified APN correspondent's interview with Colonel General Nikolay Chervov, "Soviet expert on military-political affairs": "Defense or Attack -- On Reagan's 'Antimissile Decision'" -- place and date of interview not given]

[Text] [Question] U.S. President R. Reagan is asserting a new strategy, which he himself described as "defensive." According to his words, this strategy will supposedly put an end to the fear of a nuclear war and "brings great hopes for the future." What is hidden behind this? Wherein lies the purpose of this new concept?

[Answer] First, the purpose is to establish an all-emcompassing (total) system of antimissile defense on earth and in outer space that would provide a 100 percent guarantee of the destruction of the presumed enemy's missiles. "Guided energy, beam weapons, lasers and computer technology" are to form the basis of this sytem of antimissile defense. Second, it is to accumulate strategic offensive weapons with a very definite goal -- to gain the offensive potential for a first nuclear strike. In other words, one envisages the formation of an "absolutely reliable shield" and of a "sword against which there is no defense."

[Question] One can thus say that the "antimissile decision" foresees the development of weapons using guided energy, lasers, computers and so forth, weapons that are to be deployed in outer space. Is, from the military viewpoint, such a system of antimissile defense "absolutely reliable"?

[Answer] As a matter of principle, there does not and cannot exist any absolute weapon. The "absolutely reliable antimissile defense" is just a mirage. The makers of the American "wonder weapon" are wrong when they assume that the "Russians cannot match the United States in the standard of technical development." It must be clear to everyone that nowadays there cannot exist any large difference between the leading countries. The advanced countries have reached approximately the same scientific-technical standards and have weapons that are roughly equivalent, although, naturally, there can exist insignificant differences in some respects. One could cite a number of examples to demonstrate this. Let us mention only some of them.

While implementing the program aimed at developing the multiple nuclear warhead, the Johnson and Nixon administrations doubted that the Soviets could build a similar warhead. Notwithstanding these "forecasts," the Soviet Union did develop such missiles. The same applied to the development of new missile-carrying submarines (the Ohio-class in the United States and the Typhoon-class in the USSR). The USSR has repeatedly had to respond to the American side's challenge by developing similar weapons systems of its own: to the MX missiles with analogous missiles; and to the American missiles with a flat trajectory and a long range with its own long-range missiles with a flat trajectory, which are already being tested in the Soviet Union.

The examples cited demonstrate that neither side can overtake the other by a great margin. This is also true of the sphere of antimissile defense. The efforts of one side to form an "absolute shield" force the other side to reinforce devices for overcoming it, all the more so as the antimissile defense will naturally have its weak, vulnerable spots -- in the control, command and trageting system, in the work of the computers and so forth.

[Question] What can be the outcome of the law of "action and reaction" in the sector of antimissile defense?

[Answer] Only a new round in the unrestrained race in developing and producing strategic weapons. It goes without saying that there is an inseparable linkage between defensive and offensive strategic weapons. Restraint of the two sides in the sphere of antimissile defense will enable advancement along the path toward disarmament and toward reducing the number of offensive strategic weapons. The United States has decided to eliminate this mutual linkage. The consequence of this will be an unlimited, very dangerous and immensely costly race in developing and producing all types of strategic weapons -- both offensive and defensive.

[Question] Where, then, is there room for the "hopes for a future in peace" invoked by President Reagan? After all, it must be clear to everyone that security cannot be strengthened by amassing nuclear weapons. Peace cannot be strengthened by amassing nuclear weapons. Peace cannot be sought with the help of a new generation of destructive weapons. Every new generation of weapons yields nothing but an addition risk.

[Answer] There exists one way toward strengthening security -- general disarmament. It is not the arms race but disarmament talks, which are the hope for strengthening security. It is necessary to reach an agreement stipulating that no new weapons systems will be developed and produced and that the numbers of existing weapons will not be increased but decreased as far as possible.

Regrettably, the American side is clinging to a different approach. With regard to the administration in Washington, one does not see any signs of a serious endeavor to slow down the arms race and to bring about disarmament.

[Question] Representatives of the American Administration have declared that new systems of antimissile defense are not inconsistent with existing treaties and agreements. Is that so?

[Answer] One can on no account agree with these declarations. First, the United States is disregarding commitments which it adopted in the sphere of strategic arms limitation. The agreement on antimissile defense (of 1972) firmly established: "Effective measures toward limiting systems of antimissile defense would be an important factor in curbing the race in developing and producing offensive strategic weapons and would lead to lessening the danger of the outbreak of a war involving nuclear weapons." The protocol of 1974 envisaged a further limitation of antimissile defense systems. Reagan's "antimissile decision" is completely inconsistent with these demands. Second, Article No 5 of the agreement states: "Each side commits itself not to develop, test and deploy systems or components of antimissile defense with bases on the sea in the air, in outer space or with mobile land bases."

The emergence of antimissile defense with combat complexes of its outer space bases endangers the whole system of international legal regulations imposing limits on the arms race.

It violates, above all, the agreement on antimissile defense as a whole because the agreement bans both sides from developing antimissile defense based on new physical principles -- lasers, microwave radiation, beam weapons and so forth (according to the agreement, the two sides are entitled to use only those components of antimissile defense that are enumerated in it). Aside from this, the envisaged use of weak nuclear explosions for igniting roentgen lasers constitutes a violation of the 1963 agreement banning nuclear tests in the atmosphere, in outer space and under water. The agreement of 1967 on principles governing the activities of states in the exploration and use of outer space, which bans the launching of mass destruction weapons into space as well as undertakings that may have a harmful impact on the environment, is also being violated.

[Question] How can one explain this attitude of Washington to the vital issues of war and peace?

[Answer] We rightly speak of a very clearly defined orientation of Washington's foreign policy. Its basis is the U.S.' endeavor to become the domineering military power of the world. This is the aim pursued by all of Washington's practical deeds and by its entire propaganda activity -- the "zero option," the "interim solution," the "radical reduction of strategic arms," the "antimissile decision" and others.

All of these actions tellingly expose Washington's insincerity in solving problems of disarmament and its endeavor to acquire military supremacy. The concept of establishing a system of antimissile defense on a fundamentally new basis -- that has nothing in common with the "defense" of America but it is a step drawing America closer to the unleashing of a nuclear war, in which it will not escape punishment. Reagan's "antimissile decision" destabilizes the situation, creates an obstacle to disarmament talks and promotes the arms race. The race to the nuclear abyss continues. One cannot rule out for the future the concept of a "Star War," adorned with President R. Reagan's peace rhetorics. However, that is a very dangerous path.

PREPARED STATEMENT OF LAURENCE H. TRIBE

I am honored to have been asked to testify at this historic joint hearing of the Senate Judiciary and Foreign Relations Committees on a question of potentially great significance both to the arms race and to our constitutional structure.

Some may be tempted to ignore constitutional issues when addressing matters as momentous as global survival in the thermonuclear age; attending to niceties of the separation of powers in that ultimate context may seem a bit like rearranging the deck chairs on the Titanic or, more aptly, catering a tea party on the eve of Armageddon. But if we have learned any enduring lesson from our recent travail over Iran and the Contras, it is that ignoring the constitutional structure in order to achieve even noble international goals like the eradication of terrorism has a way of backfiring. As we celebrate the Constitution's Bicentennial, we should reaffirm that the legacy left us by the Framers is not a curiosity to be dusted off only for ceremonial occasions and for disputes whose results do not matter much but a framework for governance to be taken seriously even when the Chief Executive honestly believes the nation's security requires a different course.

What, one might ask, has all this to do with the Strategic Defense Initiative (SDI) and its consistency or inconsistency with the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems (the ABM treaty)? The answer is straightforward, although perhaps not altogether obvious. Under Article VI of the Constitution, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." The meaning of a treaty, such as that concluded in 1972 with respect to anti-ballistic missile systems, is therefore a matter crucial not only to the interpretation of an international contract and to the conduct of foreign diplomacy but to the President's constitutional obligation, solemnly imposed by Article II, Section 3, to "take Care that the Laws be faithfully executed." Thus, if the Reagan Administration's recently proposed reinterpretation of the ABM treaty -- an interpretation intended to permit development and testing of anti-ballistic missile weapons that are based in space and that use laser technology, particle beams, and other relatively exotic systems -- is inconsistent with what the ABM treaty actually says and means, it becomes vital to say so not only out of respect for a military and diplomatic contract between nations but, more fundamentally, out of respect for the social contract represented by the Constitution of the United States.

In Goldwater v. Carter, 444 U.S. 996 (1979), when the Supreme Court refused to make the federal judiciary available to resolve a dispute between several Senators and President Carter over the President's decision to terminate the Mutual Defense Treaty of 1955 with the Republic of China (Taiwan), a four-Justice plurality (consisting of then-Justice Rehnquist, joined by then-Chief Justice Burger and Justices Stewart and Stevens) stressed that, "while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty." 444 U.S. at 1003. Thus, although Senators might have had standing to complain in federal court that such abrogation without Senate consent improperly cut them out of a process in which the Constitution made them players, the claim that the Constitution in fact gave them an indispensable role in treaty termination was deemed by the plurality to be beyond the reach of adjudication.

Whether Senators, or the Senate as a body, would have standing to complain in court that the President is abusing a treaty that he is not terminating -- by reading it to mean something very different from what was ratified -- is highly problematic. To many, such a complaint would be hard to distinguish from a complaint by members of Congress, or by Congress as a body, that an executive agency is abusing a duly enacted congressional law by reading it to mean something different from what Congress passed. Ordinarily, at least, complaints about such misconstruction or distortion of federal law may be heard by federal courts only at the behest of individuals or groups directly injured by such alleged infidelity to the law, not at the behest of the law's authors. The same might be true here, but the catch is that it would be difficult to identify individuals or groups directly injured by development and testing of space-based systems -- until it is far too late for a judicial declaration of illegality to make any difference. The apocalypse that the ABM treaty was meant to prevent has a way of making other things decisively moot.

But the prospect that no court will be in a position to make a timely declaration as to the validity or invalidity of the proposed reinterpretation of the ABM treaty makes it all the more vital for the Senate, whose members take an oath to uphold the Constitution just as do federal judges and the President himself, to express its considered judgment as to whether the President's proposed course of action would violate that treaty and, therefore, "the supreme Law of the Land," in the words of Article VI of the Constitution.

In exercising that judgment, the Senate should remember that, as the plurality in Goldwater v. Carter noted, "the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty." That is, the Constitution's silence on the division of authority between the President and the Senate in the matter of treaty termination has no counterpart when we turn to the division of authority between the President and the Senate in the matter of treaty-making. On that subject, the Constitution is explicit: it is only "with the Advice and Consent of the Senate, . . . provided two thirds of the Senators present concur" that the President may make a treaty. The treaty to which the Senate has given its consent then becomes supreme law, binding upon the President until duly terminated. In these circumstances, it is axiomatic that the treaty means what the Senate consented to -- not whatever a future President might want it to mean.

To ascertain the meaning of a treaty, therefore, one must understand what the Senate that gave its consent to the making of that treaty had before it. To permit that meaning to be changed by reference to something that the consenting Senate did not have before it, and particularly by reference to something that was deliberately withheld from the Senate during the debates on ratification, would profoundly pervert the entire process. The Reagan Administration is pursuing such a course by relying upon a record of secret negotiations to read the ABM treaty so as to permit research and development on the Strategic Defense Initiative without withdrawing from the treaty. In doing so, it is conducting itself in defiance of important constitutional principles that I will attempt to set forth in the testimony that follows.

In an important and insightful article published last summer, Abram and Antonia Chayes noted that "the Legal Adviser's reliance on the still-classified negotiating record [of the ABM treaty discussions between the United States and the Soviet Union] raises an issue of principle that is not affected by the actual content of that record." Chayes & Chayes, "Testing and Development of 'Exotic' Systems Under the ABM Treaty: The Great Reinterpretation Caper," 99 Harv. L. Rev. 1956, 1968 (1986). The authors recalled that the "Senate, under the Constitution, is a full partner in the treaty-making process" and asked whether it is "consistent with the constitutional structure for the Executive, more than a decade after the Treaty was ratified, to advance an interpretation, based on secret materials that were not before the Senate when it gave its advice and consent . . ." Id. That question has a clear answer. It is no.

In a much-cited concurring opinion in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-96 (1951), Justice Robert Jackson noted the considerable constitutional difficulty with giving any legal effect whatever to secret legislative history -- history not generally available and not part of what Congress voted upon when it passed a statute and what the President relied upon when he signed it into law. Indeed, Justice Jackson went further and expressed doubt about the wisdom of relying even on ostensibly public legislative history that might not be readily available to the many who must be guided by what the law says.

Whatever one's view as to the proper place of legislative history that is theoretically public but practically unavailable, there can be but one answer to the question of what place an indisputably secret negotiating history can have in the meaning of any law -- whether domestic legislation passed by Congress and signed by the President or passed by a two-thirds vote over his veto, or a treaty negotiated by the President and consented to by a two-thirds vote of the Senate. Such secret histories cannot be taken into account because they were not part of the record on which the legally decisive votes were taken.

The issue arises most often in the context of interpreting a federal statute. There, as Judge Frank Easterbrook has noted, it is a corollary of the separation of powers that "[w]hat the legislature did not solve, the executive did not address. What was not presented for veto is no law." Easterbrook, "Legal Interpretation and the Power of the Judiciary," 7 Harv. J. Law & Public Policy 87, 88 (1984). It is for this reason that the

Supreme Court has steadfastly refused, in interpreting federal laws, to pay attention to such documents as committee reports from post-enactment sessions of Congress. See, e.g., Oscar Mayer & Co. v. Evans, 441 U.S, 750, 758 (1979). Such rulings reflect something much deeper than attention to evidentiary niceties. If a House or Senate Committee, by including language in a secret report not placed before those who ultimately vote on a measure, could alter the operative meaning of the measure later enacted, then the entire process established by the Constitution would be subverted. And this is no less true if the language is drafted by the measure's floor managers than if it is added in hindsight by legislators having no relation to the bill as enacted. In either case, whether the extra-record material is imported into the governing history with the aid of time travel or by the technique of declassification, the process by which ideas become law has been sideswiped through interventions entirely alien to the lawmaking structure set forth in the Constitution.

Precisely the same is true with respect to treaties. There is no doubt, for example, that the Senate may include explicit reservations in its consent to a treaty. See, e.g., Haver v. Yaker, 9 Wall. 32, 35 (1869). In so doing, it effectively withholds its consent from the treaty presented to it but makes clear in advance what altered treaty would receive its consent. See L. Henkin, Foreign Affairs and the Constitution 134 (1972). But surely the Senate could not give unreserved consent only to unveil later a secret committee report indicating that it meant to agree not to the treaty the President told the Senate he had negotiated, and not to the treaty as it appeared in light of the information available to all participants, but instead to a quite different treaty, one whose meaning would emerge only upon examination of formerly undisclosed Senate records.

So too the President cannot present one treaty to the Senate, accompanied by various formal submittals, obtain the consent of the Senate to that treaty based in part on those submittals, and then unveil a hitherto secret record of negotiations or understandings -- either internal to the executive branch or between the executive and the foreign signatory to the treaty -- to defend an interpretation of the treaty inconsistent with what the Senate had been led to believe it was accepting.

In the course of invalidating the legislative veto as inconsistent with the separation of powers, the Supreme Court, in INS v. Chadha, 462 U.S. 919, 955 (1983), reminded the country that "[t]he Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art.II,§2,cl.2." That constitutionally prescribed role would be rendered utterly meaningless if the President could hand one ABM treaty to the Senate -- a treaty the Senate would have understood in functional terms rather than in terms artificially linked to particular technologies -- and then, having won the Senate's approval for that treaty, could whip out what amounted to another treaty altogether, or have a future President do so, based upon classified materials shared at the treaty's creation with the Soviet Union but not with the Senate of the United States.

The Chadha decision invalidated the legislative veto because it represented a congressional circumvention of the "finely wrought and exhaustively considered procedure" for lawmaking. 462 U.S. at 951. But it is not only the legislative branch that may be tempted to circumvent the Constitution's structural provisions; the Court in Chadha recognized "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power" and stressed that the pressure "even to accomplish desirable objectives, must be resisted." Id. (emphasis added). The recently released report of the Tower Board, established to investigate usurpations of authority within and by the executive branch in the Iran-Contra affair, is but the latest reminder that such "hydraulic pressure" is at least as likely to flood the White House basement as to inundate the halls of Congress.

This is not to say that treaty negotiations may not properly include secret discussions between the executive and representatives of foreign powers. Surely our negotiations with our allies in concluding a mutual defense pact, for example, need not be fully shared with our adversaries. But it is quite a leap from that proposition to the conclusion that our negotiations with our Soviet adversaries may not only be withheld from the Senate -- as though _it_ were the adversary -- but may then be invoked to justify creating a revisionist history of what those negotiations yielded. Permitting any President to succeed with such circumvention of the treaty-making process would make a mockery of the Senate's constitutionally specified role in that process, and would represent yet another step toward privatizing, and rendering constitutionally unaccountable, the conduct of this nation's most vital foreign affairs.

For these reasons, although I cannot pretend to be an expert on the history of the ABM treaty itself, I commend the Senate for giving the most serious consideration to a resolution that would reflect that history in a clear declaration of what the treaty means -- and why the President is not free under our Constitution to give it a new meaning by turning to a record of negotiations that was available to the Soviets but not to the Senate itself at the time it gave its original consent. The Constitution gives to the Senate, not the Soviets and their negotiators (even in conjunction with all the President's men),[3] the task of deciding whether this nation shall be committed, as part of its supreme law, to a particular treaty. For the Senate to say as much would represent a victory for the rule of law as well as a vindication of international sanity.

RESPONSES OF LAURENCE H. TRIBE TO QUESTIONS ASKED BY SENATOR KERRY

Question.

1. What actions, if any, could the Congress take within the Constitution to insure Executive compliance with Treaties according to the terms they were understood by the Senate when it approved the Treaties?

Answer.

As to the actions that Congress might constitutionally take to insure executive compliance with treaties according to the terms as understood by the Senate when it gave its approval, I am afraid that the only binding step open to the Congress is a prohibition on expenditures on those matters as to which the Congress deems proposed spending to be incompatible with a particular treaty. Resolutions by the House or Senate or by the entire Congress, although entirely appropriate, do not have binding legal effect in this connection.

Question.

2. Judge Sofaer has made much out of the ambigious language in Agreed Statement D that "in the event ABM systems based on other physical prinicples and including components capable of substituting for ABM interceptor missiles, ABM launchers or ABM radars are created in the future, specific limitations on such systems and components would be subject to discussion." In your views, can ambigious language in an Agreed Statement properly be read to defeat unambigious prohibitions contained in an article of a Treaty?

Answer.

As to Judge Sofaer's views about ambiguous language in Agreed Statement D, I believe that Senator Nunn's testimony of March 11 provides a decisive refutation. Moreover, such ambiguous language cannot properly defeat unambiguous prohibitions contained in an article of a treaty as those prohibitions were explained to, and understood by, the Senate that gave its consent.

PREPARED STATEMENT OF JOHN B. RHINELANDER

Mr. Chairmen and Members of the Committees:

I am delighted to appear before this joint hearing of the Foreign Relations and the Judiciary Committees. The Administration's attempt to implement unilaterally the "re-interpretation" of the ABM Treaty is an issue that strikes at the purpose of the Treaty, at the Senate's Constitutional role of advise and consent in the making of treaties, and at the rule of law.

In the spring of 1971 I was serving as a Deputy Legal Adviser in the Department of State. Ambassador Gerard Smith invited me to Vienna, where the fourth SALT negotiating session was in progress, to begin the process of drafting an ABM Treaty and Offensive Agreement for the U.S. I remained with SALT through the conclusion of the SALT I negotiations. I prepared very detailed analyses of the ABM Treaty which are still classified. I left government in late June 1972 after the ABM Treaty had been transmitted to the Senate. I have not had access to any of the classified negotiating documents since then.

I will not take up the Committee's time by reciting a full discussion of the development of the ABM Treaty. I have provided that information previously to both Senate and House Committees. At this time, I will merely note ten points.

1. The ABM Treaty text, which contains a functional definition of ABM systems, is unambiguous and only supports the "traditional" interpretation of Article V(1).

2. To the best of my recollection, the negotiating record supports the conclusions that: (a) the Soviets agreed Article V(1) covered "exotic" technology; (b) the word "currently" was included in Article II(1) for the explicit purpose of reinforcing the definition of ABM systems as functional; and (c) Agreed Statement D made explicit the implicit deployment ban on fixed land-based "exotics" in Article III.

3. The "reinterpretation" offered by Judge Sofaer is absurd, and is inconsistent with the Treaty text, the purpose and scope of the Treaty, and the negotiating history.

4. The Executive provided the "traditional" interpretation of Article V(1) to the Senate in 1972, and the Senate understood and accepted that interpretation in providing its advice and consent.

5. The analysis of the ratification discussions offered by Judge Sofaer in October 1985 is patently misleading.

6. U.S. statements and conduct from 1972 until October 1985 reflect the "traditional" interpretation.

7. While of no official standing, the book chapter I wrote in 1972-1973 (after informally clearing the text with government officials) which was published in 1974, explicitly describes the "traditional" interpretation.

8. While public Soviet statements prior to October 1985 were not explicit, those statements and Soviet actions are consistent with the "traditional" interpretation.

9. As reported in the press, private Soviet statements in Geneva after ratification and prior to the unilateral U.S. "reinterpretation" support the "traditional" interpretation.

10. Based on the above, the "traditional" interpretation is legally binding on the U.S. and the Soviets.

I support the thrust of the Senate resolution on the ABM Treaty Interpretation. In addition, I would urge the Senate to reinforce this interpretation as it wields its power of the purse.

Mr. Chairmen, I am prepared to respond to your questions.

JOINT LETTER FROM ABRAM CHAYES, ERNEST A. GROSS, LEONARD C. MEEKER, AND ROBERTS B. OWEN

March 26, 1987

Senator Claiborne Pell
Chairman
Senate Committee on Foreign Relations

Senator Joseph R. Biden, Jr.
Chairman
Senate Committee on the Judiciary

Dear Chairmen:

The undersigned are former Legal Advisers of the Department of State. We are writing in opposition to the Administration's proposal to construe and apply the 1972 Anti-Ballistic Missile Treaty, for the first time in its 15-year history, in such a way as to permit rather than prohibit testing of space-based ABM components pursuant to President Reagan's Strategic Defense Initiative.

A number of factors bear on the proper interpretation of the ABM Treaty: whether the new interpretation squares with (1) the language of the Treaty, (2) the intent and purpose of the negotiators, U.S. and Soviet, (3) the understanding of the Senate when it gave its advice and consent to ratification, and (4) the practice of the parties in construing and applying the Treaty. It is surely relevant also to take into account the views of the other party to the Treaty on its proper interpretation. The public is entitled to ask whether the Administration, in advancing a new interpretation, first undertook a thorough and objective examination of the relevant factors just listed. There is overwhelming evidence that the answer to that question is "no."

The text of the Treaty itself is straightforward. In Article V, "Each Party undertakes not to develop, test or deploy

ABM systems or components which are sea-based, air-based, space-based, or mobile land-based." This prohibition does not apply to the fixed land-based systems and components permitted by Articles III and IV of the Treaty.

The Administration is now contemplating early development and testing of air-based and space-based ABM components in the SDI program, contending that such ABM components are not covered by Article V of the Treaty because they are based on physical principles not current when the Treaty was negotiated in 1972. The Administration argues that this interpretation is supported by Agreed Statement D, attached to the Treaty. The statement reads:

> "In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty."

The Statement shows on its face the design of reinforcing and strengthening the prohibition of Article V: the "specific limitations" on new systems and components are "In order to insure fulfillment of the obligation [in Article V] not to deploy ABM systems and their components except as provided in Article III of the Treaty." Moreover, American negotiators of the Treaty from the outset took the position that Agreed Statement D had the sole function of prohibiting deployment of fixed land-based ABM systems and components; all other ABM systems and components were ruled out in any event by the prohibition of Article V.

There were a number of leading officials on the U.S. side of the negotiations (Gerard Smith, Paul Nitze, Graham Parsons, Harold Brown, Philip Farley, John Rhinelander, Raymond Garthoff, Sidney Graybeal, Lawrence Weiler, and Lieutenant General Royal Allison). In developing its new interpretation, the Administration has consulted among these individuals only one, Paul Nitze, who is now a member of the Reagan Administration. Apparently, the Administration has chosen not to consult the others. This is unfortunate because several of them have detailed recollections and documents demonstrating that the proposed new interpretation is flatly contrary to the intent and purpose of the U.S. and Soviet negotiators -- and also inconsistent with the position held by Ambassador Nitze before the Administration first advanced its new interpretation. Eight of the negotiators have issued a statement affirming the traditional interpretation.

The legislative record of the Senatorial deliberations at the time of ratification has been considered by the Administration in a most selective way, which apparently the Department of State now acknowledges. That record as a whole strongly supports the conclusion that, when the Senate gave its advice and consent, it believed that the Treaty prohibited the kind of SDI activity now being proposed by the Administration. For example, in submitting the Treaty to the Senate for approval, the Secretaries of State and Defense confirmed that the Treaty banned the development, testing, or deployment of future and exotic ABM systems which are sea-based, air-based, space-based, or mobile land-based. Senators Thurmond and Buckley noted this effect of the Treaty in the Senate debate, and Senator Buckley voted against the Treaty for this reason.

The U.S. and Soviet Governments followed and reiterated the original and traditional interpretation of the Treaty in a series of reports and statements until the Reagan Administration's announcement of a complete turnabout in October 1985. For example, the reports to Congress of the Arms Control and Disarmament Agency through Fiscal Year 1985 took the position that the ABM Treaty prohibitions apply to directed energy technology or any other technology. Similar positions were taken by Soviet representatives during the 1979 SALT II negotiations and in the Standing Consultative Commission established to deal with questions arising in the application of the ABM Treaty. Under international law, the practice of the parties to a treaty after it has been concluded constitutes an important guide to its proper interpretation.

At present, both the U.S. and USSR are accusing each other of non-compliance with the ABM Treaty because of the deployment of new radar arrays in Siberia and in the United Kingdom. A unilateral decision by the Administration to adopt and act upon its novel treaty interpretation would amount to a massive, deliberate move of non-compliance by the United States. What is called for is what the Treaty itself requires: discussion and resolution of disputed issues between the two parties.

Abram Chayes
Ernest A. Gross
Leonard C. Meeker
Roberts B. Owen

THE ABM TREATY AND SDI DEVELOPMENT

By S. Fred Singer

Does the Anti-Ballistic Missile Treaty of 1972 permit the testing and development of exotic technology not current in 1972 for the Strategic Defense Initiative? The Administration believes that the "legally correct" interpretation permits such testing. Critics, including some U.S. senators, disagree. The treaty language itself, however, supports the Administration's position.

First Senator Carl Levin, and now Senator Sam Nunn, have attacked the "broad" interpretation of the treaty (i.e. one permitting SDI testing), as put forward by State Department legal adviser Abraham Sofaer. The debate centers on how to interpret the (secret) negotiating record, the original intent of the negotiators, the understanding of the U.S. Senate when it ratified the treaty, and the behavior of the United States and the USSR since the treaty was signed.

All of these may have some relevance, but surely the language of the treaty itself must take precedence. It's the words of the treaty that count, not what Soviet negotiator Karpov is said to have said to his American opposite.

The crucial language is in Article II, which defines what is meant by ABM systems and components "for the purposes of this Treaty". According to para.2, they "include those which are (a) operational; (b) under construction; (c) undergoing testing; (d) undergoing overhaul, repair, or conversion; or (e) mothballed."

This listing can be recognized as exhaustive and complete,and clearly refers only to technology current in 1972. Had the drafters meant to cite all of five categories merely as examples, they would or should have added "but not limited to" after "include". The legal maxim "expressio unius exclusio alterius", or just a plain reading of the words, would indicate that the ABM Treaty does not apply to SDI technologies.

It is worth noting that the "equally authentic" Russian version of the treaty does not translate "include" by the most direct term, but uses instead the unambiguous "otnosyatsya", which means "refers to". In the absence of a qualifier, such as "among others", there is thus no question that the Russian version covers only 1972 technologies.

Once one gets away from the language of the treaty, then there are many questions and controversies:

o What were U.S.intentions and understandings before, during and after the negotiation of the treaty?

o If our negotiators wanted to prohibit the development of exotic ABM technology, such as lasers, why did they not obtain the clear language they sought?

Opinions seem to be divided on some these issues, based on one's interpretation of the negotiating record.

But the crucial question is: Was intent mutual? What were the understandings of the Soviet negotiators? Testimony by our negotiators, and the negotiating record itself --as seen by them-- cannot prove much about Soviet intentions and understandings. Soviet statements to our negotiators could have been either misunderstood or misreported. Or, they could have been designed to mislead.

Chief negotiator Gerard Smith describes Soviet intentions in his book Double Talk as follows:"...the Soviets urged that including unknown matters like future ABM technology in a treaty would create endless arguments and suspicions...Our task [the Soviets argued] was to limit deployment of known ABM components.."(Emphasis added)

Henry Kissinger recalls (on Meet the Press, Feb.8,1987) that Soviet negotiators did not want to consider technologies that didn't exist [in 1972]. More significantly, Marshall Grechko used a broad interpretation when he presented the ABM Treaty for Soviet ratification (as reported by Pravda, Sept. 30, 1972). (President Reagan referred to Grechko's statement in his recent press conference).

This evidence would seem to contradict Senator Levin's assertion in a letter to Secretary Shultz that "both America and the Soviet Union understood the Treaty in the same way [in 1972]". On the other hand, there is little doubt that the U.S.Senate had in mind the restricted interpretation when it voted to ratify the treaty in 1972.

The Administration's position has been to designate the broad interpretation of the treaty as "legally correct", but abide with the restricted interpretation for the time being. A review to be completed by April 30 will inform whether and how restrictions on testing hold back SDI development. Whenever SDI testing becomes a pacing item, the Administration will have to either insist on the literal interpretation of the treaty text or exercise the option of Article XV and withdraw from the treaty.

Professor Singer is Visiting Eminent Scholar at George Mason University, Fairfax VA, on leave from the University of Virginia

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LETTER FROM SENATOR SAM NUNN

March 26, 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
Washington, D.C. 20510

Dear Joe:

I was disappointed to learn that at the joint Foreign Relations/Judiciary hearing today on the ABM interpretation issue, Judge Sofaer stated that I believed the negotiating record of the ABM Treaty is "ambiguous." This statement, which misrepresents my conclusions on this subject, is unfortunately similar to a comment in Secretary Shultz's March 19, 1987 letter in the Washington Post. The relevant portion of that letter reads:

> Several Senators who have read the study agree that the Soviets did not bind themselves to the narrow view. And Senator Nunn has found that both the Treaty language and the negotiating record contain ambiguities.

Anyone hearing Judge Sofaer's testimony or reading Secretary Shultz's letter would think I was equivocal about the lessons to be learned from the negotiating record. This misimpression is only possible due to the fact that neither Judge Sofaer nor Secretary Shultz referred to or acknowledged several crucial sentences in my March 13 speech on the negotiating record.

To set this matter straight, I wanted to bring to your attention the full statement of my conclusions on this issue as stated on the Senate floor on March 13:

> Based on my review, I believe that Judge Sofaer has identified some ambiguities in this record. One cannot help but wish that the U.S. and Soviet negotiators had achieved a higher level of clarity and precision in their drafting of this accord. Of course, as we in the Senate well know, writing clear law is a worthy goal but one which is not easily attained.
>
> These ambiguities are not, however, of sufficient magnitude to demonstrate that the Nixon administration reached one agreement with the Soviets and then presented a different one to the Senate. I want to repeat that sentence, because I think it is important: These ambiguities are not, however, of such magnitude to demonstrate that the Nixon administration reached one agreement with the Soviets and then presented a different one to the Senate.
>
> Notwithstanding these ambiguities, the negotiating record contains substantial and credible information which indicates that the Soviet Union did agree that the development and testing of mobile/space-based exotics was banned. I have concluded that the preponderance of evidence in the negotiating record supports the Senate's original understanding of the treaty -- that is, the Traditional Interpretation.

In short, I went to some lengths in my speech, including repeating a key sentence, to present my conclusions in a manner which would preclude anyone from misconstruing my initial comment about the negotiating record containing "some ambiguities".

I appreciate the opportunity to correct the record on this important point.

Sincerely,

Sam

Sam Nunn
United States Senator

cc: The Honorable George Shultz
Judge Sofaer

LETTER FROM ABRAHAM D. SOFAER

April 1, 1987

The Editor:

I am sure you will appreciate that I would disagree with many of the characterizations in your article on myself in your April 6 edition. I wanted especially, however, to set the record straight on one assertion that distorts in an important way what I stated to the Senate Foreign Relations and Judiciary Committees on the question of the legal effect of the Senate's ratification record.

Your article says that I "claimed that nothing the Administration tells the Senate during the ratification process is binding." My testimony, however, was addressed to the effect of the Senate's ratification record on international obligations toward the other party to a treaty, not the obligations of the President toward the Senate under the U.S. Constitutional structure. In particular, I was addressing a proposal by Senator Biden that would define as the meaning of a "treaty" what the Senate understood it to be. The Soviet Union is not bound by what is said in internal U.S. ratification proceedings, just as we are not and would never agree to be bound by what is said in internal Soviet ratification proceedings.

On the other hand, I quoted with approval a Staff Memorandum of the Foreign Relations Committee to the effect that Committee reports and similar internal ratification materials, "although purely domestic documents and of no concern to other parties, ~~have value~~ to the Executive and Judicial Branches in interpreting the intent of the Senate. They serve as legislative history in the event questions should arise over the meaning of a treaty." I also said that "of course, the President cannot and should not disregard views expressed during Senate proceedings, which are of considerable importance."

Sincerely yours,

Abraham D. Sofaer

Editorial Page Editor,
Time Incorporated,
Time and Life Building,
Rockefeller Center,
New York, New York 10020

LETTER FROM LAURENCE H. TRIBE

April 24, 1987

The Honorable Joseph R. Biden, Jr.
The Honorable Claiborne Pell
United States Senate
Washington, DC 20543

Dear Senators Biden and Pell:

The State Department's Legal Adviser has testified to these Committees that "When [the Senate] gives its advice and consent to a treaty, it is to the treaty that was made, irrespective of the explanations [the Senate] is provided [by the Executive]." Tr. 62. In other words, the treaty means what the President and the foreign power privately agreed that it meant at the time it was negotiated. In the Legal Adviser's opinion, both the treaty's apparently contrary public text and the Senate's clearly contrary public understanding of what it was approving are irrelevant, even if the President may have withheld crucial records of the treaty negotiations or otherwise deliberately and significantly misled the Senate during the ratification process.

First, as a matter of constitutional law, the Legal Adviser is wrong. He presumes that the President unilaterally "makes" treaties with foreign nations which the Senate subsequently is asked to ratify. The Constitution provides otherwise. The President has the power to "make Treaties" only "by and with the Advice and Consent of the Senate . . . provided two-thirds of the Senators present concur." Article II, Section 2. No treaty is "made" until the Senate has given its consent, thereby permitting the President to ratify the treaty. This is how a treaty becomes part of "the supreme Law of the Land." Article VI.

Under the Legal Adviser's model, the meaning of the ABM treaty as a matter of federal law is to be gleaned not by examination of what the President and the *Senate* agreed upon, but by examination of what the President and the *Soviets* agreed upon -- regardless of what the President may or may not have told the Senate about what he had negotiated. *This is tantamount to saying that President Nixon made the ABM treaty the supreme law of the United States with the advice and consent of the Soviet Union.* Obviously, the ABM treaty that became law in 1972 was the ABM treaty, accompanied by various formal submissions, to which the Senate gave its consent. The Executive may not now unveil a hitherto secret record of negotiations or understandings to defend an interpretation of the law inconsistent with what the Senate was led to believe it was accepting. To allow such a ploy would be to allow the Executive to make treaties *without* the advice and consent of the Senate. Nothing in the Legal Adviser's analysis makes this position plausible.

Second, even as a matter of international law, the Legal Adviser's position is deeply problematic. He voices concern that adoption of the Biden Resolution would make a narrow interpretation of the ABM treaty binding only on the United States, and not on the Soviet Union, thereby destroying the mutuality of obligation so critical to all contracts, including treaties. But the Legal Adviser's concern is wholly hypothetical, for the Senate is *not* trying to impose on the United States an obligation or restriction in excess of the obligations and restrictions agreed upon in 1972 between the U.S.A. and the U.S.S.R., nor an obligation or restriction to which the Soviet Union does not deem itself likewise to be bound. Instead, the Senate is informing the President through the Biden Resolution that pursuit of the SDI based on the President's interpretation of the ABM treaty would constitute -- in the Senate's opinion and in what it has every reason to believe will also be the Soviet opinion -- a breach of that agreement.

The Legal Adviser also purports to find the Biden Resolution unworkable, because it would effectively hold the Soviet Union responsible for monitoring the American ratification process. But surely it is not asking too much of the Soviets -- who evidently know every word whispered behind the locked and guarded doors of the American Embassy -- to keep abrest of the *public* exchanges between the American Executive and the American Senate during the process of advice and consent. The Soviets come to the negotiating table well aware that the treaty they would make must satisfy the Senate as well as the Executive, because those two institutions *together* speak for the United States under the Constitution. Who can doubt that the Soviets followed the American ratification of the ABM treaty very closely indeed? To advocate Presidential power to deceive the Senate is bad enough; to do so on the premise of Soviet stupidity is sheer folly.

Sincerely,

Laurence Tribe

Laurence H. Tribe

LETTER FROM LOUIS HENKIN

27 April 1987

Dear Senator Biden,

This letter is in response to the invitation to answer questions by Senator Kerry and to supplement my testimony of March 11 in the light of intervening testimony before the Committees.

1. It is not disputed that if the Senate expresses a particular understanding of a treaty provision as a condition of the Senate's consent, the President can make the treaty only in accordance with the Senate's expressed understanding.

It seems to be suggested, however, that if the Senate does not make its understanding a condition of its consent, how the Senate interpreted the treaty is essentially irrelevant. That is not correct. In my view, if the Senate's understanding is clear, the President can make the treaty only in accordance with that understanding, whether or not that understanding is expressed as a condition of consent. Indeed, if there is any reason to doubt that the Senate's understanding is shared by the other party or parties to the treaty, or if it appears that the Senate's understanding might somehow differ from what the treaty might be held to mean as a matter of international law, the President is bound to communicate the Senate's understanding as being the understanding of the United States wher he makes the treaty.

2. In giving its consent, the Senate is entitled to assume that the treaty means what it would reasonably be interpreted to mean according to its text as read in context and in the light of the object and purpose of the treaty. The Senate is not required, and should not be encouraged, to clutter every consent resolution with expressions of understanding on every point as to which there is any possible ambiguity. When the President makes the treaty for the United States after the Senate has consented to it, the President is entitled to assume that the Senate so interpreted the treaty; he, too, need not, should not, clutter the ratification by the United States with over-cautious expressions of understanding.

3. I have looked again at Section 2 of S. Res. 167 in the light of criticism leveled against it. I do not read Section 2(A) as giving "special weight to Senate acquiescence in any interpretation communicated by the Executive." I read that clause as indicating one element in determining the Senate's understanding of a treaty. When the Executive communicates an interpretation to the Senate at the time the Senate is considering the treaty for possible consent, the Executive's interpretation, and the Senate's acceptance of, or knowing acquiescence in, that interpretation, are probative evidence that the Senate accepted the Executive interpretation, and that therefore both the President and the Senate shared that understanding when the Senate

gave consent and the President ratified the treaty for the United States.

The objection to Section 2(A) as well as criticism of Section 2(C) may reflect confusion of the treaty-making process for constitutional purposes with what a treaty may be held to mean internationally. Under international law and practice, other states are not bound to explore the unexpressed understandings of the Senate, or even the expressed ones, if the President fails to communicate them as United States understandings. It may be, therefore, that if the President does not communicate the Senate's understanding — whether or not it is expressed — the United States might prove to be bound by a treaty other than the one the President-and-Senate intended. For that reason, or for other reasons, it may be that on some future occasion an international tribunal will interpret a treaty differently from the way the President-and-Senate understood it. (That is analogous to what happens in domestic law when an agent has apparent authority and is held to have bound his principal to something the principal did not in fact authorize.) The danger of such slippage can be reduced by better coordination of our Constitutional process with international processes.

Perhaps some of the confusion could be avoided if 2(C) were eliminated and its substance attached to Section 2(A). That section might then read:

(2)(A) Under the United States Constitution, during the period in which a treaty is in force, the meaning of that treaty is what the Senate understands the treaty to mean when it gives its advice and consent, a meaning which is informed by reference to [expressions of intent by the Senate as well as Senate acquiescence in any interpretation communicated by the Executive.] any formal expression of understanding by the Senate, as well as by other probative evidence of what the Senate understood the treaty to mean, such as Senate approval or acceptance of, or Senate acquiescence in, interpretations of the treaty by the Executive Branch that were communicated to the

Senate. Of course, the Senate's understanding of the treaty cannot be informed by matter of which it was not aware, such as private statements during the negotiations which were not communicated to the Senate.

Sincerely,

Louis Henkin

PREPARED STATEMENT OF SENATOR RICHARD G. LUGAR

The initial panel in this hearing is to address a very important aspect of the current debate about the interpretation of the ABM Treaty -- namely, the proper standards under international and domestic law for the interpretation of treaties, and the Senate role in the treaty-making process.

My understanding of the current state of the law is that, where the text of a treaty is not clear on its face, there are several sources of material that are relevant to determining the proper interpretation of the treaty. These include the negotiating record, the subsequent practice of the parties, and the record of the ratification proceedings.

It is natural for Senate committees to have a particular interest in the record of the Senate ratification proceedings, since they embody the Senate's role in the treaty-making process. It is very important, however, that we keep in proper perspective the relative significance of those proceedings in the overall process of interpreting a treaty.

The Senate does have the ability to attach conditions to its advice and consent to a treaty in its resolution of ratification, and the President has an obligation to adhere to them if they are within constitutional bounds. Beyond that, the Senate has a right to expect that the President will give appropriate weight to any understandings expressed during Senate proceedings, just as is the case for material in the legislative record of a statute.

We should not forget, however, that a treaty is first and foremost an agreement between the governments which are party to it, and the basic object of the treaty interpretation is to determine what those parties intended the treaty to mean. The Senate's ratification proceedings may shed light on what one of the parties understood the treaty to mean, but statements made during internal ratification proceedings cannot bind any other party.

In my view, the Resolution introduced by Chairman Biden does not give a fully accurate portrayal of these principles. It treats the process of treaty interpretation as though it were simply a matter of determining what the Senate understood the treaty to mean during ratification. It says that the negotiating record is not relevant to the meaning of the treaty if the Senate's understanding is clear, and it even says that one may only refer to the text if there is no evidence as to what the Senate intended.

All of this would, of course, come as an unpleasant surprise to other treaty partners, who are not bound under international law by what is said in our ratification proceedings, and who have every right to rely on what they actually negotiated with us. For our part, the United States would never accept the assertion by another country that it would disregard the treaty text and the record of its negotiation, in favor of the understanding of the treaty stated in its own internal ratification proceedings.

The Biden resolution purports only to speak to what is required under the U.S. Constitution. Without agreeing with what the resolution says on this point, it simply does not provide us in any event with an adequate basis on which to make a sensible judgement on how to interpret a treaty. The purpose of a treaty is to establish mutual rights and obligations with a foreign government, in this case the Soviet Union. It does us no good whatsoever to attempt to impose limitations on the President based on what may have been stated during Senate proceedings, if the other party will not be bound by those limitations.

Therefore I would oppose the Biden resolution. I think we should focus our attention on determining whether the Administration's views on the ABM Treaty are correct and sensible, taking into account all factors that are relevant under the law.

PART II

The second panel in our hearing this morning is to address the question of the interpretation of the ABM Treaty. It includes one former member of the U.S. negotiating team who will presumably have views on what the parties agreed to during those negotiations.

In this connection, it is useful for us to review what has recently been said on this question by another of the U.S. negotiators, namely, Ambassador Paul Nitze. I would like to introduce into the Record his address on April 1, 1987, to the Johns Hopkins School of Advanced International Studies, which explored this matter at length. Let me summarize a few of Ambassador Nitze's main conclusions:

-- According to Ambassador Nitze, the United States unquestionably sought to regulate comprehensively not only conventional ABM components -- missiles, launchers and radars, but all devices that could substitute for those components.

However, the Soviets explicitly limited their proposals to missiles, launchers and radars, and repeatedly opposed having the treaty cover other devices.

-- After considerable back and forth in the negotiation, the two sides reached agreement on a text for Article V, which prohibits development, testing and deployment of space-based and mobile ABM systems and components. At that point, the Soviets assured the U.S. negotiators that this new language would apply to any future type of ABM component. However, at that time the Soviet draft treaty defined "component" as including only ABM missiles, launchers and radars. The U.S. negotiators did not press them on this point.

-- Later in the negotiations, the Soviets accepted a U.S. proposed compromise on Article II, which defined ABM systems and components, adding the phrase "currently consisting of" in front of the list of ABM components. However, the Soviets accepted this language only after we explicitly assured them that the coverage of substitute devices would be settled elsewhere than in Article II.

-- After this point, the Soviets continued to oppose U.S. attempts to regulate substitute devices. They suggested that if systems or components based on other physical principles were created in the future, we should discuss this matter in the Standing Consultative Commission. This led to Agreed Statement D, in which the Soviets agreed, in effect, that after such devices were created, their deployment would be permitted, if at all, only after discussions and agreement .

-- Ambassador Nitze concludes that his recollection of the negotiating process leaves him convinced that the Soviets agreed in a binding manner to prohibit only the deployment, and not the development and testing, of systems based on other physical principles and their components capable of substituting for conventional ABM components.

This is the clear recollection of one key U.S. negotiator who has had, by virtue of his present position in the Government, the opportunity to refresh his recollection by reference to the negotiating record. Naturally, we will look forward to comparing his recollections with those of other negotiators.

The real issue before us is whether the Administration's view of the ABM Treaty has merit, and where the U.S. Government should go from here with respect to the Treaty.

LETTER FROM HENRY F. COOPER

August 29, 1986

The Honorable Dan Quayle
United States Senate
Washington, D.C. 20510

Dear Senator Quayle:

As you requested, I am writing to provide the substance of our conversation last week regarding my perception, based on our negotiations since March 1985, of the Soviet views on the restraints on development and testing of "future technologies" under the ABM Treaty. I trust these thoughts will be useful to you in your discussion with your colleagues in the Senate.

The March 1985 Soviet proposal (which is still on the table) included a ban on the development, testing and deployment of so-called "space-strike arms." The Soviets have defined "space-strike arms" to include all space-based ABM systems and components, all space-based weapons capable of attacking targets in the atmosphere and on Earth's surface, and anti-satellite (ASAT) systems of all basing modes. (Notably they left out ground-based ABM systems, which have been the focus of most of their ABM research, development and deployment activities.)

Their proposed ban on the latter two categories (i.e., space-to-earth weapons and ASATs) clearly went beyond existing international commitments. But their proposed ban of space-based ABM systems at first puzzled us because it seemed redundant with existing U.S.-Soviet obligations under Article V of the ABM Treaty. (They did propose to ban all "scientific research" as a part of development, which went beyond the ABM Treaty, but we never took that as a serious proposal.)

Light was shed on this puzzle last year by an intensive internal review of the ABM Treaty negotiating record. During our second round, we began to draw upon that record to refute Soviet charges regarding the legitimacy of the SDI program under the ABM Treaty. Following these initial discussions with the Soviets in the second round, a very comprehensive review was undertaken in Washington between the second and third rounds, and during the third round. That review led to the conclusion that the Soviets never agreed to include ABM systems based upon "other physical principles" in the Article V prohibition. The only limitation on such ABM systems and components agreed to by the Soviets was included under Agreed Statement D which prohibits deployment without negotiation and amendment to the Treaty, but not development and testing of such systems and components.

As Ambassador Gerard Smith makes clear in his book, Double Talk, the Soviets opposed all limitations on future ABM systems. (See attached exerpts.) Indeed, the earliest versions of the draft Treaty tabled by both sides were understood by both sides to apply to only then-current technologies. After the U.S. Government decided (following substantial internal debate as described by Ambassador Smith) to seek limitations of "future" ABM systems as well, the U.S. Delegation pursued that objective with diligence. Just as diligently, the Soviets opposed the U.S. objective. Careful study of the record shows that neither side was totally successful, and both sides were partially successful, in achieving their objectives. The U.S. objective of a limitation on ABM systems based on "other physical principles" was achieved, and that limitation was embodied in Agreed Statement D. Ambassador Smith points to this achievement with legitimate pride in his book. (See p. 344 in the attached exerpts.) But he did not get everything he wanted; the record shows that the Soviets did not accept Article V to apply for substitute "devices" for ABM components (i.e., ABM interceptors, ABM launchers, and ABM radars) in spite of the U.S. negotiators' best efforts to get them to do so.

In this light, we now understand that the inclusion of all space-based ABM systems and components in the March 1985 Soviet proposal to ban "space-strike arms" was not redundant with prohibitions under the ABM Treaty -- as we first thought in March 1985. Furthermore, I believe the Soviets probably had believed, since 1972, that the ABM Treaty permitted development and testing of other than fixed land-based ABM systems composed of ABM interceptors, ABM launchers and ABM radars. This was their "half-a-loaf" in 1972. Some of my conversations with my Soviet counterparts, prior to the U.S. public announcement of the results of our comprehensive review tends to confirm this view. Since then, the Soviets have adopted a uniformly contrary view. This is understandable, because our decision to constrain the SDI program to be consistent with our previously held view of the terms of the Treaty puts them in the best of all worlds. The U.S. has legitimized the "broader interpretation" for them, if there was any doubt, while continuing the narrow restraints on activities under the U.S. SDI program. Their public position is no doubt intended to provide pressure to help perpetuate this situation.

I want to emphasize again that I believe our Negotiating Group, because of our dialogue with the Soviets in Geneva, stimulated the study by Defense, State and ACDA last summer and fall. The study was not undertaken out of the blue to "torpedo the Treaty" as some have suggested. It was a logical consequence of our negotiations. Indeed, the absence of negotiations on strategic defenses since 1972 was probably the reason why this was the first time such a comprehensive study of the negotiating record was undertaken. This is itself a rather startling fact.

From my personal study of the 1972 negotiating record and the 1972 ratification hearings, I believe what happened was simply that many on the U.S. side believed they achieved their negotiating objective of including ABM systems based on "other physical principles" under the Article V prohibitions. I believe the Soviet negotiators probably returned to Moscow believing they had agreed to limit deployment of such systems, but that they had a partial victory in not prohibiting their development and testing. I have no doubt but that if we had observed the Soviets conducting such development and testing of Article V systems based on "other physical principles," they could have explained the legitimacy of their activities with a clear rationale, based upon the Treaty and negotiating record. And our lawyers would have argued they had a case difficult to refute. I trust the current study of the record by the Senators will arrive at the same conclusion.

Best regards,

Henry F. Cooper
Deputy Negotiator
Defense and Space Group

JOINT LETTER FROM SENATORS TO SAVE THE ABM TREATY

March 10, 1987

Honorable Ronald Reagan
President
The White House
Washington, DC 20500

Dear Mr. President:

Having served in the Senate when it voted on the ABM Treaty in 1972, we reaffirm our support for the Treaty. We believe that this international agreement of unlimited duration makes an important contribution to American security and to reducing the risk of nuclear war.

When the Senate consented to ratification of the ABM Treaty by a vote of 88-2, it understood that the Treaty prohibited the development and testing, as well as deployment, of all space-based and other mobile-based ABM systems and components, regardless of whether they use 1972-era or newer technologies. The Senate's understanding of the Treaty is clear from President Nixon's letter transmitting the Treaty to the Senate and Secretary of State Rogers' report on it, as well as from discussions in Committee hearings and on the Senate floor. Since the Senate's ratification of the Treaty rested on this interpretation, a contradictory interpretation would be tantamount to amending the Treaty, and would require the advice and consent of the Senate to become law.

We believe that this clear meaning of the Treaty is crucial to its viability as a valuable agreement that promotes American security. We urge you to work with the Soviet Union to prevent further erosion of the ABM Treaty and to bring to an end prior departures from the terms of the Treaty, such as the Krasnoyarsk radar. As Ambassador Paul Nitze has testified, the Soviets have not violated the Treaty's ban on developing and testing space-based ABMs. Development and testing of such weapons by the United States would constitute a major violation of the Treaty and would seriously undermine its fundamental objectives.

We appreciate your assurances that the Administration will abide by the established interpretation and urge you to discuss with the Soviet Union additional measures to guarantee that both parties respect this standard.

Respectfully Submitted,

James B. Pearson
James B. Pearson

Edmund S. Muskie

The following former Senators join in endorsing this letter:

Hon. Birch Bayh
Hon. Edward W. Brooke
Hon. Howard W. Cannon
Hon. William Fulbright
Hon. Fred R. Harris
Hon. Harold E. Hughes
Hon. Warren Magnuson
Hon. Gale W. McGee
Hon. George McGovern
Hon. Thomas J. McIntyre

Hon. Walter Mondale
Hon. Frank E. Moss
Hon. Gaylord A. Nelson
Hon. John O. Pastore
Hon. Abraham A. Ribicoff
Hon. William B. Spong
Hon. Adlai Stevenson III
Hon. Stuart Symington
Hon. John V. Tunney

PREPARED STATEMENT OF SENATOR ERNEST F. HOLLINGS

Mr. President, I thank the Majority Leader for his courtesy in granting me this time to review the history and facts pertaining to the ABM Treaty -- and to discuss recent allegations made in the Senate about the Reagan Administration's interpretation of the Treaty.

Mr. President, by way of introduction, permit me to review my long-standing interest in space-based defense and the ABM Treaty.

When President Carter was dragging his feet on developing a space-based defense, I joined with Senator Wallop of Wyoming to increase research funding for a ballistic missile defense capability -- BMD for short, the forerunner of SDI. As a member of the Appropriations Committee -- 6 years on the Military Construction Subcommittee and 10 years on the Defense Subcommittee -- I have been involved continuously with space-based defense. I was Chairman of the Defense Task Force of the Senate Budget Committee in the mid-1970s.

Senator Wallop and I have been the Senate Chairmen of the Coalition for SDI since 1985. Over the years, I have participated as a member of the Office of Technology Assessment in its space studies and reports. Moreover, I presently serve as Chairman of the Appropriations Subcommittee that controls the budget for the Arms Control and Disarmament Agency, and also as Chairman of the authorizing committee for NASA, which plays a very critical role in the SDI program.

Accordingly, I take a very keen interest in any kind of budgetary or legislative constraints on research, testing, and development related to space.

Mr. President, in recent days, this body has been presented with a so-called "narrow" interpretation of the ABM Treaty that is the result, quite frankly, of a fundamental disregard of the Treaty's language.

The Treaty and its negotiation record both speak with one voice in substantiating the view of President Reagan that research and testing of the Strategic Defense Initiative -- along with its potential deployment by the mid-1990s -- are clearly in accord with the terms of the Treaty ratified by the Senate on August 3, 1972.

The Treaty's ratification process was far from definitive on today's dispute over a "broad" as opposed to a "narrow" interpretation. And I would point out that the entire floor debate on the ABM Treaty was so brief and cursory that it occupies only ten more pages in the Congressional Record than the recent exegesis by Senator Nunn. "Broad" versus "narrow" was not in the vocabulary of Senators in 1972. Only now has the Senate or any Administration seen fit to explore the exact meaning of the Treaty. Only now has this issue become truly relevant. Only now has the option to test and develop mobile exotics become technologically feasible.

Moreover, I have concluded that the new, narrow interpretation -- never properly justified -- can be arrived at only by ignoring the negotiation record and the Treaty itself.

The treaty our ABM negotiators sought and the treaty they wound up with are two different things. They were instructed to reach a ban on future exotic ABM systems. They did not. To this day, they apparently hope that by saying a prohibition on future ABM systems was obtained -- and by repeating this often enough -- they will make it so. In fact, nothing in the negotiation record, the Nixon Administration's statements at that time, or internal documents explicitly confirms Soviet acceptance of such a prohibition -- and, thus, a restrictive interpretation.

Certainly, it is right and proper for all Members to assess the relevant documents ~~in~~ reaching conclusions on this matter. I would urge my colleagues to review the Treaty and the classified material available in Room S-407 in the Capitol. However, it is neither right nor proper for Members to impugn the integrity of those in the Administration who have spent countless hours preparing a thoughtful and balanced marshalling of facts that credibly support President Reagan's interpretation of the Treaty.

Let us be absolutely clear on this point: I am not arguing for deployment of SDI now. General Abrahamson has just testified before the Senate that it will be, at best, five years before research and testing have progressed sufficiently to permit deployment. The current Administration will be long gone before any final decision is made on deployment. And, I repeat, this Senator has no intention of voting for deployment until we have had successful testing and development.

Nonetheless, I believe that those who argue for a narrow interpretation are being misleading and disingenuous in presenting their views. It is obvious to me that the purpose of those opposing the President in this matter is not limited to propounding a new, so-called "restrictive interpretation" of the Treaty. Their larger objective -- certainly the larger effect of their actions -- is to kill the SDI program outright. They hope that if the President senses trouble for SDI in the Senate, he may compromise his position on testing in exchange for greater budget support. They know that if he is forced to amend the Treaty, such action would be stonewalled by the Soviets and, thus, the President's plans will be stymied. If they can stop testing, they can delay or stop research, drive up program costs to prohibitive levels, and in the process destroy SDI.

Indeed, the opposition well understands the effect of delays in testing and development. If we are only permitted to test and develop under a narrow interpretation, then the contracts today for testing and development would have to be scaled back. Then, as add-ons to the contracts are made five years into the future, we would be faced with prohibitive costs and delays.

I would cite our experience with the manned space station. Originally, it was estimated to cost $8 billion; that was just two years ago. Today, that cost estimate approaches $21 billion.

So what would appear to be innocent delays under a narrow view of the ABM Treaty are really very treacherous. The opposition knows what it is doing, and that is why they roll out the heavy artillery by conjuring a "Constitutional crisis." If a Constitutional crisis were to result from every erroneous or misleading representation by the Executive to the Legislative Branch, then we would be in perpetual crisis and chaos.

Senator Jackson felt that SALT I was misrepresented by the Administration; hence, the Jackson Amendment. But there was no cry of Constitutional crisis. A majority of Senators felt that SALT II was misrepresented by the Administration; hence, it was never ratified. But no cry of Constitutional crisis. We negotiated a treaty with the Peoples Republic of China and threw the treaty with Taiwan out of the window. But no cry of Constitutional crisis. And today, the President represents to the Congress that his budget meets the deficit level required by law; in fact, it is $27 billion off. But no cry of Constitutional crisis.

Mr. President, the language of arms treaties is notoriously slippery and technical and not amenable to common-sense understanding. Arms negotiators are artists, not scientists, and no one experienced in this field would think of characterizing disagreements in interpretation as Constitutional crises.

Before presenting specific points from the Treaty, the negotiation record and the ratification process -- and also before correcting some of the misconceptions that have been presented on the Senate floor -- permit me to make some general observations.

In determining the intent and meaning of a treaty, just as in a football game, you have to carry the ball over the goal line to score. In the case of the ABM Treaty, you must carry the Treaty over the goal line to score its true meaning. Yet it is here that the Senator from Georgia fumbles. In his detailed and argumentative presentation, Senator Nunn drops the ball on the 50 yard line and instead carries his helmet across the goal line. That is, he fumbles the Treaty and scores with the ratification record while everybody explains the play in his own way. Indeed, Senators' statements and explanations for voting are in many instances little more than cheers for or against a proposition.

Like parole evidence in contracts, they are useful only to clarify an ambiguity. Certainly they cannot be employed to create an ambiguity. Yet, this is precisely Senator Nunn's pitfall. He skirts the Treaty and negotiation record -- he skirts the essential question, whether the Soviets agree to be bound -- and he resorts to the sparse ratification record to justify his invocation of a "Constitutional crisis," and he avoids the essential question of whether the Soviets agreed to be bound.

Rather than join with those intent on killing SDI, let's all stop, look and listen. The President has merely asked his counsel to clarify his options under the ABM Treaty. You would think that State Department Legal Adviser Abraham Sofaer's scholarly analysis of the Treaty and negotiations record was some insidious conspiracy to produce a Treaty other than the one ratified on August 3, 1972. To label Judge Sofaer's work "legal gymnastics" and to raise the specter of a "Constitutional crisis," is a shocking departure on the part of the competent Senator from Georgia. But a calm reading of his presentation makes clear that Senator Nunn's rationale is fundamentally flawed.

The flaw is his misrepresenting the contents of Articles II and V, the true record of which is clearly spelled out in Judge Sofaer's analysis. Furthermore, Senator Nunn appears to find the one section that actually deals with systems based on other physical principles, which took months and many meetings to negotiate, namely, Agreed Statement (D) to be redundant. Absurd. Agreed Statement (D) has already been agreed to; it cannot be cast aside and disregarded by renegotiation. It is the one section that took months and months and meeting after meeting to negotiate. It is the center of the dispute. A study of the negotiation record shows clearly that this is the section of the Treaty that deals with SDI. We fought hard to get it, and it was all the Soviets were willing to give up on the issue of regulating unknown devices.

You don't need a ratification record to understand that the formulation of Agreed Statement (D) categorically allowed research and testing of an SDI, and that the right to deploy is subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty. It can be reasonably contended, in fact, that Article XIV doesn't require agreement and therefore there is a right to deploy. But this question is moot at this point because it will be five years before deployment could occur.

What is important at this point is research, development and testing of SDI. This is unequivocably permitted, and there is not any narrow or broad interpretation involved. The content of the Treaty and the negotiation record leave no ambiguity to be clarified by the ratification record. Let us review a few salient points.

Mr. President, far too much importance and credence is given to the ratification record of the ABM Treaty on August 3, 1972. I was there. Virtually no one was on the floor, and while eight hours were set aside during the day, one hour was yielded back because there was little debate. No mention was made of a broad interpretation or a narrow interpretation. Our attention insofar as the ABM Treaty was concerned was that we felt good that we finally had a treaty.

Three years previously, a long debate did ensue on the floor of the Senate over several days and weeks to the effect that if we went forward with an ABM system, the Soviets would walk away from the table and never agree to an ABM Treaty. I and others contended that this was precisely the way to get them to the table. We prevailed by one vote. By the month of August at the time of ratification of the ABM Treaty, we spent only an afternoon with cursory statements on the ABM Treaty because SALT I held our overwhelming attention. Heavy missiles held our attention and future research held our attention. Soviet MIRVs held our attention and the Minuteman III and B-1 held our attention. But concerning the ABM Treaty ratification, to describe a scenario whereby the Senate was misled by the Executive Branch is absurd. We were not misled because we were not led.

In addition, it is unnecessarily hyperbolic to allege that a "Constitutional crisis" has been incited by the President's action. The Senate ratified the Treaty in its role under the Constitution, and the President is abiding by the Treaty and the interpretation expounded when the Treaty was ratified. What we are witnessing is a concerted effort to intimidate the Administration into backing off on SDI.

The President's interpretation has erroneously been labeled a "new" and "broad" interpretation when, in fact, it is the proper and reasonable interpretation of the Treaty. The opponents of the President -- attempting to seize the high ground -- describe their position as the "traditional" or "restrictive" view. The "facts" supporting such a position cannot be verified. They make profound statements on constitutional integrity and the rule of law and then ignore or reinterpret international and domestic law concerning the interpretation of treaties and the role of the Senate.

Senator Nunn bases his conclusions supporting the restrictive interpretation of the ABM Treaty almost exclusively on the Senate ratification proceedings. Such proceedings have the least probative utility for judging a treaty's meaning when the Senate fails to make any such interpretation a part of its resolution of ratification, and especially when the treaty's wording is susceptible to objective interpretation and the negotiation record is clear. Rather than focusing on the ratification proceedings, he should have weighed the evidence of the Treaty text and the negotiation record in the first instance. Had that evidence offered up a convincing meaning, as it does, the ratification proceedings need only be referred to for consistency or deviation from the understanding of the Parties. (*Air France v. Saks*, 470 U.S. at 400 (1985).) Even then, that record could not provide a basis for binding the Soviets to an understanding of which they were not formally informed.

Mr. President, I met in Helsinki in 1971 with our ABM and SALT I negotiators. I am one of 19 sitting Members of this body who voted for ratification of the ABM Treaty. The vote was 88-2 for ratification. Roughly one month later, on September 14, 1972, I was one of two Senators voting against the SALT I Treaty because it *sanctioned* the arms race, it institutionalized inequalities and inferiorities in critical areas that we have never been able to overcome. Indeed, the acronym SALT, in my view, stands for Stop America's Lead in Technology. The ABM Treaty, however, created an equality in numbers, it allowed the research and development of new ABM technologies, and I supported it on that basis.

The Treaty contains no ambiguity whatsoever on the point of future ABM technologies. It clearly permits them. The ambiguity has been manufactured by the President's critics to obscure the issue and lend credibility to a flawed thesis. Moving beyond their unquestioning allegiance to the flawed SALT II Treaty, the President's opponents on ABM technology would force him to comply unilaterally with a new interpretation of the ABM Treaty not substantiated by any record. Indeed, it is a Treaty that the Soviets brazenly violate. Further, the actions of these critics would require the Soviet's blessings for the U.S. to proceed. In effect, they would grant the Soviets power to decide our rights and obligations -- to dictate our defense programs and policies.

I repeat, at the time of the ABM Treaty ratification, no attention was given to a narrow or a broad interpretation. The Treaty was represented as being balanced and verifiable -- it sought only to control those things that could be controlled. At the time of the ratification of the Treaty, the discussion and debate for all practical purposes was carried on off the floor and focused almost exclusively on SALT I. We were talking about future technologies and strategies. In connection with SALT I, the Jackson Amendment of August 7, provided:

> "...the Congress considers that the success of these agreements and the attainment of more permanent and comprehensive agreements are dependent upon the maintenance of a vigorous research and development and modernization program leading to a prudent strategic posture."

As I saw it, Mr. President, that was the key point to the Jackson amendment.

Senator Nunn addressed the Senate on three consecutive days. It was a clever presentation. On the first day, he spent most of his time parsing the ratification record in order to justify his view that the

Administration's position is a "reinterpretation" of what he calls the "traditional" interpretation.

But Senator Nunn's legal analysis is backward; no one can seriously contend that the negotiation process in an arms control treaty is of lesser probative value than the ratification process. The second day Senator Nunn made a brief presentation of the actions of the parties subsequent to the Treaty and, almost as an afterthought, the third day he touched on the negotiation record, again quoting sources that have little probative value (his classified study of that record is still not available). I must state categorically to my colleagues that in an arms control treaty, the negotiation process cannot be disregarded and, indeed, often governs the result. You cannot get the true meaning or understand the content of any of our arms control treaties without a reference to the negotiation process. The Soviets accept this and have frequently done so. Particularly is this true of the ABM Treaty.

There are two important sections to the ABM Treaty -- one dealing with present systems and the other with future systems. Article II that defines ABM systems deals with the present. Our negotiators tried their utmost to have this section also govern future systems, but their numerous attempts over months of negotiations were completely thwarted. And so we were left in Article II with current components of ABM systems -- that is, those existing in 1972 -- as distinguished from the limitations on future devices contained in Agreed Statement (D). When you understand this, you understand that the prohibition on mobile/space-based systems in Article V refers to variants or improvements of the then existing land-based components in Article II as distinguished from future devices based on other physical principles in Agreed Statement (D). Senator Nunn conveniently ignores this and intentionally distorts it. He says the restrictive language of Article II is merely illustrative and future systems are included in this definition. This is incorrect. Agreed Statement (D) and the language on future devices took months to reach, and it is an Agreement and not an Understanding. --

There is no way to reconcile Agreed Statement (D) with Article II if Article II covers future systems. Senator Nunn realizes this and suggests that we refer Agreed Statement (D) to the Consultative Commission to obtain agreement. Here we have an Agreement, yet in order to justify his exercise we are asked to have it once again agreed upon. Once you understand these two points, you begin to realize how misleading the Nunn presentation is. The Senator misreports disputed sections of the Treaty and repeatedly cites the ratification record. Yet it is clear from all authority that the ratification process and record are far from binding.

There is no reason for this confusion. The Treaty, together with the negotiation record, is categorical. It is in no way ambiguous. It is clear what was intended and neither the Soviet Union nor the United States can be bound by subsequent Administration or Senate statements. The experts cited by Senator Nunn as supporting the narrow interpretation all spoke differently or noted differently at the time of the negotiations. Ambassador Paul Nitze, who was present throughout the negotiations, has verified the Administration's view of a so-called broad interpretation. Henry Kissinger, former Secretary of State and National Security Advisor at the time the Treaty was negotiated, has also affirmed that the broad interpretation and not the narrow one conforms to the Treaty.

Judge Sofaer was asked as the Administration's Counsel to give the options under the ABM Treaty. He has done so with a credible and scholarly analysis of the Treaty and the negotiation record itself. He is now completing a comprehensive report on all facts relevant to the Treaty. His report is due April 30.

Mr. President, the arms control agreements of the 1970's put a hold on American technology, allowing an inferior Soviet capability time to catch up and match us. The advocates of these policies preached that the key to world peace and stability lay in bristling, overwhelming nuclear arsenals that promised the certainty of mutually assured destruction if they were ever unleashed.

To the dismay of proponents of this MAD doctrine, the President's SDI program brought with it not only the potential to truly protect and defend our nation, but to render nuclear arms obsolete. Confounded by this breakthrough, the President's opponents have scrambled to revise the history of the ABM Treaty.

A major reason why we can hear conflicting points of view about the Treaty is the fact that the negotiation record and analysis of the Treaty are classified. Accordingly, I urge the President to declassify this information and open the record to the public. I will offer a Senate Resolution requesting that this be done. Currently, the President's opponents are using the cloak of classification to their advantage. Yet the record, if opened to the light of day, demonstrably supports the President's view.

The Treaty and the Negotiation Record

The ABM Treaty allows futuristic, exotic ABM technology that is space-based, period. It is not ambiguous on this fact, notwithstanding any statement to the contrary made on the Senate floor. There are three parts of the Treaty relevant to a discussion on future ABM technologies and deployment. They are Articles II and V of the Treaty and Agreed Statement (D) to the Treaty. Let us now look at the letter of these three articles (the emphases are my own.)

Article II

> 1. For the purpose of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of:
>
> (a) ABM interceptor missiles, which are interceptor missiles constructed and deployed for an ABM role, or of a type tested in an ABM mode;
>
> (b) ABM launchers, which are launchers constructed and deployed for launching ABM interceptor missiles; and
>
> (c) ABM radars, which are radars constructed and deployed for an ABM role, or of a type tested in an ABM mode.
>
> 2. The ABM system components listed in paragraph 1 of this Article include those which are:

(a) *operational*;
(b) *under construction*;
(c) *undergoing testing*;
(d) *undergoing overhaul, repair or conversion*; or
(e) *mothballed*.

The particular language of Article II was debated and discussed at great length during the negotiations on the Treaty. Finally, it was agreed upon with the emphasis on "currently consisting of." Thereafter, under Section 2 of the Article, the components that constituted an ABM system in 1972 were listed as: (a) operational; (b) under construction; (c) undergoing testing; (d) undergoing overhaul, repair or conversion; or (e) mothballed.

This description clearly refers to present systems -- that is 1972 systems -- and not future ones. The word "currently" was used in Article I, Section 1, and by way of emphasis and elaboration, words of restriction were included under Article II, Section 2. They had to be either operational or under construction, undergoing testing, undergoing overhaul, repair, or conversion, or mothballed. But they had to be those systems existing in 1972. That must be emphasized. The distinguished Senator from Georgia comes forth and says that includes future systems. The words of the Article do not say that.

In 1972, U.S. technology in the ABM area was of a land-based nature. The language in Article II of the Treaty categorically limits ABM systems to those extant in 1972.

The negotiation record clearly shows that U.S. negotiators sought for months to make the definition in Article II include not only those systems existing in 1972 but all futuristic ABM systems and components. We proposed language that would have achieved this result unambiguously. But the Soviets flatly refused to accept any limitation or prohibition on unknown devices. In fact, in exchange for the Soviet acceptance of the words "currently consisting of" in Article II, the U.S. side conceded that future systems would be covered elsewhere than in Article II.

The opponents of the President ignore the record and, instead, state that the Article II definition is generic and the components listed therein are strictly illustrative.

They affirmatively state that the categorical confinement of ABM systems to the present also includes the future. This gives them an opportunity thereafter to distort the future systems, or those "based on other physical principles" in Article (D) of the Agreed Statements. I refer to a statement by Senator Nunn on page S2975 of the March 11, 1987 Congressional Record.

Mr. President, I find this explanation somewhat amusing. The Senate supposedly ratified a Treaty that was "illustrative" of what was intended. By this same logic, I suppose the numerical limitations in the SALT II Treaty can be called illustrative. For example, the 820 limit for total MIRVed ICBM launchers is an illustration and not binding. You could have 775 or 850, just be in the range. I believe Members of the Senate voted on the ABM Treaty based on its wording and not on the basis that it was only illustrative of what the Treaty was intended to do.

There are two problems with Senator Nunn's statement regarding Article II. First, he omits a portion of the Article, clause II (2), which clearly ties ABM systems to the technology of 1972. The interesting aspect of this omission is that my colleague is guilty of the charge which the critics abundantly impute to the Administration -- namely, showing only part of the record in an attempt to strengthen one's case.

The second problem concerns the assertion that President Reagan's interpretation finds Article II ambiguous. To the contrary, President Reagan's interpretation sees no ambiguity in Article II. It states that ABM systems defined in Article II consist of those existing in 1972. That is what the Soviets insisted on and got us to agree to. Case closed.

One final point on Article II. Senator Nunn ignores the attempt made by the U.S. to include future systems in Article II. The negotiation record indicates that repeated attempts were made to include "exotic" or "future" ABM technologies. The fact that every attempt failed proves that the language of Article II is a categorical confinement to then-extant components. If this was not the case, then it should have been an easy matter to refer to "exotic" or "future ABM technologies" in Article II.

> Article V
>
> 1. Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.
>
> 2. Each Party undertakes not to develop, test, or deploy ABM launchers for launching more than one ABM interceptor missile at a time from each launcher, not to modify deployed launchers to provide them with such a capability, not to develop, test, or deploy automatic or semi-automatic or other similar systems for rapid reload of ABM launchers.

Article V categorically does not prohibit the development, testing, and deployment of future, exotic mobile/space-based ABM systems or components based on other physical principles.

Both the negotiation record and the ratification process confirm that the limitations on futuristic (exotic) ABM technologies were not included in Article V. In a manner similar to the question of future "exotics" raised during negotiation of Article II, the U.S. negotiating team tried for several months to tie this technology to the prohibition of mobile/space-based systems referred to in Article V.

The Soviets resisted repeatedly, citing their refusal to include prohibitions on unknown devices. In turn, this refusal led to the formulation of Agreed Statement (D) and to the conclusion that limits on future ABM technology would be contained in this additional clause.

The prohibition contained in Article V on ABM systems or components which are sea-based, air-based, space-based, or mobile-based relate to the then-extant ABM systems defined in Article II.

In the interpretation advanced by the opponents of President Reagan, since Article II and its broad "illustrative" definition includes all futuristic "exotic" ABM systems, Article V therefore bans the development, testing, or deployment of all mobile/space-based versions of ABM systems including "exotics."

However, this view contradicts the meaning of Article II and the record on it. Because Article II defines ABM systems as limited to the ground-based technology of 1972, Article V can only be referring to mobile/space-based versions of those systems. This becomes quite clear and consistent when Articles II, V, and Agreed Statement(D) are reviewed in concert.

Agreed Statement (D)

> In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty.

Agreed Statement (D) is the only section of the Treaty dealing with futuristic ABM technology or exotics. This Statement is part of the Treaty for one reason and one reason only. U.S. negotiators failed to gain Soviet acceptance of a prohibition of future ABM systems in Articles II and V. It was this failure that created the need for and resulted in Agreed Statement (D). The classified record supports this fact.

Senator Nunn, speaking for the President's opponents, offers a highly imaginative interpretation of Agreed Statement (D). He raises two points in support of his restrictive interpretation: One, that the term "based on other physical principles" refers solely to fixed, land-based exotics and two, if no agreement is reached on amendments to the Treaty, deployment of exotics remains prohibited.

There are several flaws in these arguments. If Agreed Statement (D) refers only to fixed, land-based exotics, why doesn't it explicitly state "fixed, land-based systems" rather than "ABM systems based on other physical principles?" Further, why was this entire separate statement added to the Treaty when qualifying words could have been added to both Articles II and V of the Treaty to handle the fixed, land-based contingency? There is no possible way to interpret Agreed Statement (D) as referring only to fixed, land-based exotics, and the negotiation record confirms this.

If Articles II and V of the Treaty prohibited futuristic "exotic" ABM technology, then Agreed Statement (D) would be superfluous. It only makes sense to have Agreed Statement (D) if Articles II and V don't ban futuristic systems. Then a comprehensive reading of Articles II and V and Agreed Statement (D) clarifies the definition and limitations for those ABM systems existing in 1972 -- the language of Articles II and V -- and future ABM systems based on other physical principles -- the language of Agreed Statement (D). The classified record and ratification statements also clarify this distinction.

The President's opponents are correct when they assert that there is an ambiguity under his "correct" interpretation of Agreed Statement (D). The ambiguity concerns whether deployment of ABM systems based on other physical principles can occur if agreement is not reached on limitations under Article XIV. Agreed Statement (D) is imprecise on this issue, and it is my view that you can deploy whether or not agreement is reached.

Legal Interpretation

The analysis presented to the Senate against the President's "correct" interpretation also dealt with aspects of international law relative to treaties when the words of the treaties are imprecise. This is nonsense in the face of the Treaty and the negotiation record.

This analysis attempts to bend the principles of treaty construction to divert attention from their ordinary application.

Having directed us to the usual authorities -- the Vienna Convention on the Law of Treaties; Lord McNair's profound treatise, The Law of Treaties; McDougal and Laswell's Interpretation of Agreements; and the Restatement, Foreign Relations Law -- the analysis proceeds to ignore the lessons of all. Where each of these authorities sets forth what is, in essence, a step-by-step process for determining the meaning of a treaty, in which the successive steps are only necessitated by the failure of the previous ones to enunciate the meaning, the analysis ascribes each step equal weight.

For instance, Lord McNair does not arrive at his two-and-one-half-page discussion of the "aim and purpose of the treaty" until he first has spent fifteen pages discussing the preliminary -- and possibly determinative -- step of looking to the "plain terms" of a treaty for its meaning. McNair quotes Vattel for the splendid limiting principle, "La premiere ce qui n'a pas besoin d'interpreter." The translation is "It is not permitted to interpret that which has no need of interpretation." By contrast, the analysis presented on the Senate floor leapfrogs McNair's first principle -- i.e., to give "effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances" (emphasis in original) to demand that equal weight be given to "subsequent practice."

The deceptiveness of this approach is made manifest when the case of Nielsen v. Johnson, 279 U.S. 47 (1928), is quoted for a proposition for which it does not stand. The analysis quotes Nielsen for the proposition that when a treaty's meaning is unclear, one may look to the negotiating record to interpret it. In fact, Nielsen stands for the proposition that "when a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred." (Emphasis added.) (279 U.S. at 52.) Quite obviously, this case actually supports the proponents of the broad interpretation of the ABM Treaty.

A further citation is made for a recent case, *Air France v. Saks*, 470 U.S. 392 (1985), for the same proposition; that is, that one should look beyond the plain words of a treaty. But the Supreme Court in *Saks* takes quite the opposite approach, stating, "The analysis must begin, however, with the text of the treaty and the context in which the written words were used." (470 U.S. at 397.) The Court goes on to refer to the negotiating history and the conduct of the parties only to confirm that its interpretation is consistent with these seminal records. (470 U.S. at 400.)

In sum, treaty interpretation requires rational reliance upon the treaty text and the context in which the written words were used. Common sense tells us to look to the plain meaning of the words in the context of the treaty as a whole. First, we do not interpret that which requires no interpretation. Second, if there is some ambiguity, and if the ambiguity involves restricting or enlarging interpretations, "the more liberal interpretation is to be preferred." Third, having looked to the context as expressed in the words used by the Parties to the treaty in light of surrounding circumstances, we may turn to the negotiating record to see if the words were given special meaning. Finally, if all previous steps fail to clarify the treaty's meaning, we may resort to the ratification process and the subsequent practices of the Parties.

The Ratification Process

The Senate ratification proceedings cannot be used to prove the circumstances surrounding the Parties' understanding of the "context in which the written words were used." They can only give tentative indications of one Party's unilateral intentions, the least element of a last resort consideration. The President's critics attribute -- erroneously -- the far greatest weight to this element.

In no case can one sovereign nation be bound by the unilateral statements of another. There is no reason for the Soviets to accept these unilateral interpretations as an "instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." (Vienna Convention on the Law of Treaties, Article 31.) Even if a unilateral statement to the Senate were clear, it could not be considered an "instrument related to the treaty," and in any case it was not "accepted by the other parties."

A claim is made by the President's critics (page S2981, Congressional Record, March 11, 1987) that a Soviet citizen was present during Senate hearings on the treaty; further, that his failure to speak binds the Soviets to the views being discussed -- erroneously cast by Senator Nunn as "restrictive" views. It is the ultimate naivete to claim that Moscow was bound by its silence to something heard by some Soviet official in an internal U.S. forum. Taking this point one step further, why would a Soviet official object to a unilateral decision by the U.S. to abide by a provision not required by a Treaty? Obviously, it's to the Soviet's advantage and to our detriment.

There is no doubt that the U.S. negotiators sought a ban on future technologies. Similarly, there is no doubt that the intent of Soviet negotiators was to avoid such a prohibition. The Soviets prevailed.

Some witnesses at the ratification proceedings made statements implying that research, development, or deployment of futuristic technologies were prohibited by the Treaty. These statements were made in the context of "selling" the Treaty or "puffing their wares" over the fine job they did. Some may suspect this was to hide their failure to achieve a major goal -- the ban on future technology. Who can blame them for not wanting to advertise that they were bested in the negotiations?

Let me also point out that it has been reported that the Administration has located documents demonstrating that key U.S. officials were aware at the time of the ABM Treaty and thereafter that serious doubts existed as to whether the U.S. had secured Soviet agreement to the prohibition of exotic/space-based systems. These documents reportedly will show the situation was quite different from what Senator Nunn has suggested -- that the Soviets did not agree with the "restrictive" interpretation limiting development of any exotic ABM system based on other physical principles.

The theme of the "broad" interpretation is embodied in both the FY 1974 and FY 1975 Posture Statements by then-Chairman of the Joint Chiefs of Staff, Admiral Thomas Moorer. The parameters established by our own military after ratification of the ABM Treaty were consistent with the broad interpretation espoused by President Reagan. In his Military Posture for FY 1974, the JCS Chairman wrote:

> "As a hedge against the emergence of new threats which could gravely jeopardize our national safety, we plan to continue...new technological approaches to even more advanced ABM systems. The strategic situation is still fraught with many uncertainties. It is only prudent, therefore, that we continue our efforts to advance our ABM technology to the full extent permitted by the Treaty. This is the kind of action the Joint Chiefs of Staff had in mind with regard to the third of the 'three assurances' I presented to this Committee last summer in connection with the Hearings on the SAL Agreements; namely, full support of a 'vigorous research and development program.'" (Emphasis added.)

In the FY 1975 Posture Statement, the Chairman repeated the general thrust of the 1974 statement, but added:

> "...and retain the option to deploy a more advanced ABM system for the defense of the National Command Authority or to deploy a more extensive system should the ABM Treaty be abrogated for any reason." (Emphasis added).

How our Armed Forces could achieve these objectives under the "restrictive" interpretation of the Treaty is hard to imagine. The Chairman was speaking of advanced technologies, vigorous research and development, clearly linked finally to the option to deploy an extensive system.

The only way to exercise this option -- to reach this goal -- would be through an effective developmental and testing program. Such a program could be conducted only under a "broad" interpretation of the Treaty.

Since the negotiation record on futuristic "exotic" ABM technology is unambiguous, those Senators opposing President Reagan now seek to muddy the water by citing various statements by Senators at hearings or during floor debate on the Treaty. We all know that individual Senators habitually give individual or idiosyncratic reasons for their votes in the Senate. But none would argue that these individual rationales change the Treaty itself.

The most celebrated example cited by the President's critics is taken from testimony before the Senate Foreign Relations Committee and during Senate debate by Senator James Buckley -- one of two Senators voting against the Treaty. Senator Buckley is quoted as follows: "Thus the agreement goes so far as to prohibit the development, test, or deployment of sea, air, or space based ballistic missile defenses. This clause, in Article V of the ABM Treaty, would have the effect, for example, of prohibiting the development and testing of a laser type system based in space." (August 3, 1972, page 29703 of the Congressional Record.) That reading of Article V may have been Senator Buckley's reason for voting against the Treaty. Unfortunately, Senator Buckley's reading of Article V was flat wrong. Article V does not prohibit space-based laser activity. Indeed, Senator Hiram Fong articulated a reading of the Treaty that directly contradicted Senator Buckley's.

Senator Fong stated on page 29707 of the Record: "The principal provisions of the ABM Treaty may be summarized as follows: . . . . Fourth. Allows research and development on ABM systems to continue, but not the deployment of exotic or so-called future systems."

So now the score is one to one. I can bring up my own vote and my view at the time to the effect that advances in U.S. technology, whether land-based or space-based, were not prohibited. The point is simply this: one Senator's interpretation of a treaty is not a binding legal opinion on the matter.

Based on the often contradictory things said in Senate debate, I could interpret the ABM Treaty in 100 different ways. By citing misinformed statements by various Senators, the President's critics make his reading of the Treaty appear like a bolt out of the blue. They cite the names of Goldwater and Jackson, to the point where one wonders how to stop the running-amok of this Administration. They would have us believe we have an Administration that, in its zeal for deployment of an SDI program, is prepared to disregard the Senate itself.

We witnessed this same fallacy last week when the Senate voted an additional $40 million in aid for the contras. Immediately, the Majority Leader, who opposed the aid, announced victory on the floor, claiming that opponents of the contras had actually prevailed. But I say: Look at the vote, look at the letter of the law if you want the truth. Look not at what individual Senators say, but at what the Senate as a body does -- there is a big difference.

Next, there is the matter of statements by the Administration and some of the U.S. negotiating team that are used as illustrations, and the assertion that President Reagan's interpretation is not supported by his analysis. Senator Nunn, speaking against the President's interpretation, stated on page S2976 of the March 11 Congressional Record that "The Analysis of the Reinterpretation has not identified a single statement in the record of ratification proceedings which explicitly supports its case..."

I read Senate testimony in a far different light than suggested by this statement. On June 19th, appearing with Secretary of State Rogers before the Senate Foreign Relations Committee, Ambassador Gerard C. Smith, Director of ACDA, was questioned by Senator Aiken as follows:

> Senator AIKEN. I have been reading lately in several places about the effectiveness of the laser guided bombs in wiping out SAM's in North Vietnam. If a laser can be used in wiping out the SAM's, could the laser also be effective in the ABM system?
>
> If the laser had come three years ago, one would have voted against the ABM system when it was first proposed.

Secretary ROGERS. Under the agreement we provide that exotic ABM systems may not be deployed and that would include, of course, ABM system based on the laser principle.

Senator AIKEN. Is the ABM system getting somewhat obsolete?

Secretary ROGERS. Excuse me?

Senator AIKEN. Is the ABM system getting obsolete? If the lasers can be used to knock out the SAM's, wouldn't they be effective against other types of missiles also?

Mr. SMITH. Senator AIKEN. I think it is an entirely different problem with respect to the use of lasers to help guide offensive missiles and from their use to guide defensive missiles, but we have covered this concern of yours in this treaty by prohibiting the deployment of future type technology. Unless the treaty is amended, both sides can only deploy launchers and interceptors and radars. There are no inhibitions on modernizing this type of technology except that it cannot be deployed in mobile land-based or space-based or sea-based or air-based configurations. But the laser concern was considered and both sides have agreed that they will not deploy future type ABM technology unless the treaty is amended.[1]

It is clear from this exchange that both Secretary Rogers and Ambassador Smith concurred that the prohibition on exotic systems dealt solely with deployment and not research and testing. Further, the prohibition on mobile/space-based systems (in Article V) is tied to launchers, interceptors, and radars -- the components of the ABM systems defined in Article II -- and those components existing in 1972. The prohibition on deployment of exotic systems can thus be tied to Agreed Statement (D). And, please note, there is no indication that the restriction applies only to fixed, ground-based systems.

Ambassador Smith gave further testimony in this regard. Appearing before the Senate Armed Services Committee on June 23, 1972, he told the Committee that the "development and testing, as well as deployment of sea-, air-, space-based, and land-mobile devices is prohibited. Of perhaps even greater impotance, the parties have agreed that no future types of ABM systems based on different physical principles from present technology can be deployed unless the Treaty is amended." Once more, he had identified exotic systems as based on different physical principles from present technology. He did not limit these to fixed, land-based systems. He spoke only of a prohibition on deployment.

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[1] Page 20 of the June 19, 1972 SALT hearings before the Senate Foreign Relations Committee.

Finally, on July 25, 1972, Ambassador Smith appeared before the House Armed Services Committee and spoke of "the prohibition on the deployment of future types of ABM systems that are based on physical principles different from present technology." He stressed that such a ban was provided for in Agreed Statement (D). He stated that ". . . if such systems are developed, and one or the other side wants to deploy them under the limitation of this Treaty, there would have to first be a discussion of the question in the Standing Consultative Commission we are proposing to establish under the Treaty, and then the Treaty would have to be amended before such novel ABM system would be deployed."

Mr. President, this conclusively lays to rest what our chief negotiator believed to be the case concerning future, exotic, ABM technology. Ambassador Smith said that research and testing are clearly allowed, while deployment requires consultation and amending of the Treaty. Further, Agreed Statement (D) and not Articles II and V, governed this future, exotic technology.

This is part of the ratification record, and it directly contradicts the assertion that nothing in the ratification proceedings supports the President's interpretation of the Treaty. What is correct is that the ratification process does not support the critics' unambiguous claim that the President is subverting the intent of the Treaty and the ratification role of the Senate.

To touch briefly on a related issue, I would note that Senator Nunn's analysis cites a statement made by Raymond Garthoff, Executive Officer to the U.S. ABM Delegation (page S3092 of the March 12 Congressional Record) stating that the word "currently' was inserted in Article II to ensure that future systems would be banned by Article III (which prohibits deployment of ABM systems, except limited systems at a single site) and Article V (which prohibits development, testing, and deployment of mobile/space-based ABM systems).

This statement conflicts with the negotiation record. The Soviets continually rejected all U.S. negotiator's attempts to include future technologies in Articles II and V and insisted they be dealt with "elsewhere." That "elsewhere" is Agreed Statement (D), and the record confirms this.

The importance of the "practices" since ratification is invoked to verify the interpretation of the President's opponents in this matter, but this approach is spurious. The advanced exotic technology efforts of the U.S. addressed in Agreed Statement (D) were initiated at the Army's Ballistic Missile Division in Huntsville. They have now been absorbed by the SDI program. Even with the significant funding levels for SDI over the past few years -- roughly $9 billion -- the technology has not advanced to the point where it conflicts even with the newly propounded "strict" interpretation under Article V of the Treaty and not Agreed Statement (D).

Under these circumstances, certainly the practice is as advertised by my colleagues. So what? Neither Party to the ABM Treaty, until now, so far as we are able to know, has had the capability to face the question of "restrictive" or "broad" interpretations of restraints on ABM systems or components based on physical principles other than those existing at the time of Treaty signature. This part of the debate, therefore, is premature.

We are now hoping for deployment of SDI within the next six to eight years, and that is why the President is addressing the issue now. Likewise, that is why his critics are protesting. Meanwhile, the Soviets are in open violation of the Treaty with their Krasnoyarsk radar. In addition, there are probable Soviet covert violations with SAM systems being tested both in an ABM mode and in a mobile mode. Beyond these violations, we can only guess what the Soviets are doing from their space station.

From March 1983, when President Reagan announced his intention to proceed with SDI research and development, until October 1984, the Soviet Union heavily criticized the U.S. for introducing weapons into space and developing a large-scale ABM system. None of the Soviet criticisms suggested SDI was a violation of the ABM Treaty. These concerns only started in late 1984 and early 1985.

As a matter of fact, the Soviets spent most of their time propagandizing about the spread of the arms race to outer space and the need for a complete ban on the testing and deployment of all space-based weapons for striking targets on earth, in the air, or outer space. If the Soviets shared the so-called narrow interpretation of the Treaty with U.S. arms control proponents, why did it take nearly two years for the Soviets to use the Treaty as a bludgeon against SDI?

President Reagan's Administration is the first to give serious study to the Treaty and the negotiation record. He is to be commended for his action. I have had differences with the President over aspects of his defense policy. But, his approach to the ABM Treaty is the correct one, and I am encouraged to see good common sense being used in the formulation of our nuclear defense policy.

America is so zealous to come to terms with the Soviets in arms control that any agreement is immediately hailed as a victory and there is a stampede for ratification. Knowing this, I closely examined SALT II after Soviet Premier Brezhnev and President Carter had come to terms. I wondered why our chief negotiator, Lt. Gen. Edward Rowny, was hanging up his stars and resigning from the Army rather than be a part of the agreement.

A close examination at that time of the negotiation record showed that the treaty was not in the security interest of the United States. We had all agreed to the Jackson Amendment in SALT I, requiring SALT II to be equal, to be balanced, and to be verifiable. The record showed that it was none of the three.

SALT I, for example, was unequal, not balanced and unverifiable. And the Jackson Amendment simply stated that we wouldn't agree to these inequities again. We understood SS-19s to constitute a heavy missile; the Soviets did not. We understood that there would be no test range at Kamchatka; the Soviets did not. In short, there was no firm meeting of the minds. For instance, SALT II did not control missiles. Article IV, Section 10 Second Agreed Statement allowed decoys; thus warheads were not controlled and launchers were not even defined much less controlled. The Soviets had in mind silos with a repetitive cold-launch process and therefore unlimited. We had in mind canisters. So for all the to-do about SALT II, it did not control missiles, launchers or warheads. The Senate Armed Services Committee rejected the treaty and the votes of Democrats were there to kill the ratification.

It was not Afghanistan that stopped SALT II, it was the treaty and negotiation record that defeated SALT II. Now the opposition is using a 15-year-old treaty to block the research and development on ABM technology that will defend the United States and they are doing it by the record made on the floor of the Senate. We all know how unreliable that is.

What the President's critics seek is unilateral compliance by the U.S. to the ABM Treaty. But, that is only one side of the debate. Its proper context also includes U.S. strategic vulnerabilities and the correct response to hedge against those vulnerabilities. It includes an understanding of Soviet performance with regard to the ABM Treaty and other treaties; that is, the fact that we are discussing unilateral compliance with a treaty already breached materially by the Soviets.

Intuitively, one could believe that some case might be made if the Senate had taken the opportunity to amend the Treaty or declare its understanding to be conditional to its consent to ratify. But the Senate did none of these things. The Senate's proceedings cannot impute any special meaning that the two Parties did not spell out in the plain language of the Treaty; they cannot bind the other Party to a unilateral understanding.

Nor can this be done in the negotiation process. As just one example of the Soviets' refusal to be bound by unilateral interpretations, I would cite the issue of Soviet SS-19 heavy missiles. The Interim Agreement of SALT I prohibited additional heavy missiles but did not define what it meant by the term "heavy missile." The U.S. chose to define the term in a unilateral statement, and boldly asserted that this unilateral interpretation would be binding on the Soviet Union.

Henry Kissinger stated that "...there is the safeguard that no missile larger than the heaviest light missile that now exists can be substituted." Melvin Laird assured us that "...Regarding missile size, as you know, the United States told the Soviets that we consider a 'heavy' ICBM to be one having a volume significantly greater than the largest ICBM now operational on either side, which we consider to be the SS-11."

Similarly, Ambassador Gerard Smith noted that, "The U.S. delegation at Helsinki did make a unilateral statement that it would consider any ICBM significantly greater in volume than the largest light ICBM -- which is the SS-11 -- to be heavy." Paul Nitze reiterated this point, stating that a 50 percent increase in volume "would conflict with the U.S. unilateral statement."

But, no sooner was SALT ratified and signed than the Soviets began first to test and then to deploy the SS-19. Some 360 of these missiles with 2,000 warheads now exist. In response, Henry Kissinger observed, "I think it is at least open to question whether the United States can hold the Soviet Union responsible for its own statements when the Soviet Union has asserted that it does not accept this interpretation." The lesson, of course, is that U.S. unilateral interpretations are a prescription for a double standard of compliance and unilateral Soviet advantage.

The debate on the ABM Treaty involves decisions that may have far-reaching effect on issues much more important than the question about restrictions under which we pursue the SDI or questions about SDI funding levels or about specific technologies or about the order in which they are investigated.

It could change the Executive's ability to conduct relations with foreign powers on the basis of mutually agreed understandings and undertakings. The Executive will be subjected unilaterally to obligations that some Senators and other officials may hope foreign powers will accept as binding. The impact would be to change the nature of constitutional responsibilities.

It is clear after reviewing the Treaty, the negotiation record, and the ratification process, that the Treaty allows the development of the SDI program. Failure by the Administration to follow through with its decision that SDI is consistent with the terms of the Treaty would seriously undermine our national defense. We must have an effective and robust program exploring the feasibility of strategic defense. It is the only prudent course for responding to the Soviets' massive build-up in strategic arms.

The opponents of SDI, the opponents of the President's interpretation of the Treaty, would effectively give the Soviets veto power over the strategic defense of our nation. The recent and very promising ABM advances hold the key to our national security in the future. To compromise the Treaty is to compromise and end SDI. It is unfortunate that the President's opponents won't step forward and acknowledge that this is their goal.

PREPARED STATEMENT OF RICHARD N. PERLE

Thank you, Mr. Chairmen, for the opportunity to appear before your Committees today to discuss the ABM Treaty. Current public and political attention on that Treaty is focused almost exclusively on its proper interpretation as it relates to defenses against ballistic missiles based on "other physical principles". That will almost certainly be the case in this session today as well. Before discussing the important issue of ABM Treaty interpretation, however, I would like to concentrate on the more fundamental questions of why the United States pursued the Treaty and what conditions the United States believed had to be fulfilled if the ABM Treaty was to be in our national security interest.

Moreover, we must be constantly mindful of the indisputable fact that the ABM Treaty has been violated by the Soviet Union. Despite this fact, the United States has continued to comply with the ABM Treaty unilaterally. The debate over the legally correct interpretation must be understood as a debate over what standards we are setting unilaterally for ourselves. Those standards will have little or no influence on Soviet behavior.

Throughout most of history, states have maintained their security with a mix of offensive and defensive forces; the advent of the nuclear age did not change that situation. Thus, through the 1950s and the 1960s, the Soviet Union and the United States shared the belief that strategic defenses contributed importantly to strategic stability and deterrence. Indeed, during that period, both sides committed roughly half of their total strategic investment to the maintenance of strategic defensive systems: air defense, leadership protection, civil defense, and passive defense of offensive systems through hardening and other measures.

U.S. thinking about the role of defenses in deterrence then changed, as the ballistic missile became paramount in offensive arsenals. The technology of the time would not permit effective, stabilizing defenses against those weapons; notwithstanding the very high cost of the Safeguard ABM system, it was subject to being overwhelmed by a large Soviet offensive strike.

As a result we adopted the revolutionary concept of "mutual vulnerability", which was ostensibly enshrined in the ABM Treaty. In contrast to the previous shared strategic deterrent concept of relying on a mix of offensive and defensive systems to prevent aggression, this new notion suggested a radically different approach: it held that both sides could find greater security and the strategic balance would be more stable if the United States and the USSR were effectively to abandon defenses against ballistic missiles. With severe limits on defenses, so the reasoning went, each side could pursue balance rather than superiority in offensive forces and negotiate deep mutual deep reductions in those weapons.

It is essential to remember that the concept of mutual vulnerability was a multifaceted one. Contrary to the impression now conveyed by many, the ABM Treaty was not an end in itself. Instead, strict limits on defenses were viewed by the United States as stabilizing only if they led to offensive arms reductions. As Ambassador Gerard Smith stressed in a unilateral U.S. statement during the negotiations: "If an agreement providing for more complete strategic offensive arms limitations were not achieved within five years, U.S. supreme interests could be jeopardized. Should that occur, it would constitute a basis for withdrawal from the ABM Treaty." Offensive arms reductions, of course, were not achieved within five years, nor within ten, and have still not been achieved almost 15 years after the signature of the ABM Treaty. Instead, as we all know, Soviet offensive capabilities have increased manyfold.

The ABM Treaty has not even succeeded in inducing the USSR to restrict significantly its strategic defense activities. The Soviets have continued to spend as much on strategic defensive forces as on offensive. Over the past decade, they have spent the equivalent of $200 billion on strategic defense. Soviet strategic air defense and passive defense programs dwarf those of the United States. Their continued work on defenses against ballistic missiles show how seriously they have always taken then-Defense Minister Grechko's assurance to the Presidium in 1972 that the ABM Treaty "places no limitations whatsoever on the conducting of research and experimental work directed towards solving the problem of defending the country from nuclear missile strikes."

The USSR maintains the world's only operational ABM system, which it is currently upgrading and expanding to the limit allowed by the ABM Treaty. Several other Soviet activities violate or potentially violate the Treaty.

The Soviet Union is deploying a new series of ballistic missile detection and tracking radars, nine of which are either operational or under construction. One of those under construction, near Krasnoyarsk in Siberia, will close the final gap in Soviet ballistic missile early warning radar coverage. It is a flagrant violation of the Treaty by virtue of its location and orientation. The growing Soviet network of large phased-array radars, of which the Krasnoyarsk radar is a part, is of particular concern when linked with other Soviet ABM efforts. These radars take years to construct and their existence could allow the Soviet Union to move quickly to deploy a nationwide ABM defense. The degree of redundancy being built into the Soviet large phased-array radar network is not necessary for early warning, but it is highly desirable for defense against ballistic missiles.

During the 1970s, the Soviets developed components that could be integrated into an ABM system that would allow them to construct individual ABM sites in months rather than the years required for more traditional ABM systems. The development and testing of these components represent a potential violation of the ABM Treaty's prohibition against the development of a mobile land-based ABM system or components.

In addition, the Soviet Union has conducted tests that have involved air defense radars in ABM-related activities. The large number, and consistency over time, of incidents of concurrent operation of ABM and surface-to-air missile (SAM) components, plus Soviet failure to accommodate fully U.S. concerns, indicate the USSR probably has violated the Treaty's prohibition on testing SAM components in an ABM mode. Moreover, the SA-10 and SA-X-12B SAM systems, which we expect to be widely deployed, may have the potential to intercept some types of strategic ballistic missiles.

Taken together, Soviet ABM and ABM-related activities suggest that the USSR may be preparing a national ABM defense -- precisely what the Treaty was designed to prevent. As I mentioned previously, the United States rejected a nationwide ABM system based on traditional technology in large part because it would be ineffective against a massive first strike. However, such a system, particularly in combination with Soviet air and passive defenses, could be very effective against a necessarily more limited, ragged retaliatory strike. Thus the combination of Soviet offensive force growth and developments in ABM systems based on traditional technologies give rise to very serious concern about the long-run ability of the United States to maintain deterrence based on a credible threat of effective retaliation.

The situation would be all the more severe if the Soviet Union were able to add a monopoly on advanced defenses against ballistic missiles to its existing offensive and defensive forces. The Soviet desire for such a monopoly and accompanying strategic advantage is, of course, the reason for its all-out propaganda and diplomatic effort against the SDI. The USSR initiated a substantial research program into advanced technologies for defense against ballistic missiles in the 1960s. That effort covers many of the same technologies being explored under the

SDI, but involves a much greater investment of plant space, capital and manpower. The Soviet laser program alone, for example, involves over 10,000 scientists and engineers as well as more than a half-dozen major research and development facilities and test ranges. The Soviet laser weapons program would cost roughly $1 billion a year, over several years, in the United States.

Thus the expectations of the ABM Treaty and the broader SALT process have been utterly disappointed. Instead of sharing our concept of mutual vulnerability, the Soviets saw it as an opportunity to acquire military superiority and establish unilateral vulnerability for the West. The strategic trends of the past two decades make essential the search under the SDI for a more stable, secure long-term strategic order. At the same time, the scientific and technical progress made since 1972 gives us reason to believe that the SDI program will be able to develop advanced technologies that can provide effective defenses against ballistic missiles.

Notwithstanding the failure of the SALT process to result in offensive arms reductions, and notwithstanding Soviet violation of the ABM Treaty, President Reagan made the commitment from the inception of the SDI that it would be conducted in full compliance with all our legal treaty obligations. The SDI program was initially structured to conform to a restrictive interpretation, which holds that the Treaty prohibits development and testing of ABM systems and substitute ABM components based on other physical principles, except those in a fixed land-based mode.

In 1985, the United States undertook a review of the ABM Treaty and its negotiating history in order to gain a more precise understanding of what the Treaty permitted with respect to the development and testing of ABM systems involving other physical principles. That review was undertaken in part because the Treaty is not clear in its treatment of ABM systems based on other physical principles, and the restrictive interpretation would increasingly become a significant constraint on SDI experiments as the program progressed.

The 1985 review led President Reagan to conclude that a broader interpretation of our authority under the Treaty -- permitting development and testing of all ABM systems involving other physical principles, regardless of basing mode -- was fully justified. The President also decided, however, that it was not necessary at that time to restructure the SDI program toward the boundaries of the broader interpretation which we were entitled to observe. The President made that decision as a matter of policy, not as a matter of legal requirement, and clearly reserved the right to restructure the SDI program in the future to conform with the broader interpretation.

With further progress under the SDI, the conditions which the President found in 1985 have changed significantly. Our technical understanding of the feasibility of advanced defensive options is growing rapidly. The costs -- in terms of additional resources and time -- of continuing to follow the more restrictive interpretation of the ABM Treaty are growing correspondingly. As a result, the balance is shifting between the price that the United States and its Allies continue to pay for keeping our SDI program within the bounds of the more restrictive interpretation and our overall security requirements. For that reason, the President is now considering the restructuring of the SDI program to take advantage of our rights under the ABM Treaty.

Judge Sofaer's scholarly analysis of the Treaty text and negotiating record is thorough and exacting. It is a solid piece of work, which if anything, understates the strength of the case. The only provision of the Treaty which deals with future technologies is Agreed Statement D, which allows "creation" (i.e., development and testing) of ABM systems based on other physical principles and provides for consultations and agreement only on deployment.

The narrow interpretation renders Agreed Statement D meaningless. The broad interpretation results in a coherent reading of the Treaty. It prohibits development and testing of space-based and other mobile-based components known in 1972 -- ABM launchers, ABM interceptor missiles and ABM radars -- but allows development and testing of all ABM systems based on other physical principles.

The negotiating record clearly demonstrates that the United States tried, but failed, to secure Soviet agreement to a Treaty text that would have prohibited development of space-based and other mobile-based ABM systems based on future technologies. The Soviets strongly rejected all such U.S. efforts, arguing that restrictions could not be devised for systems and components not yet created. The U.S. side was able only to obtain Soviet agreement to Agreed Statement D which, as I noted previously, places no restrictions on development and testing of future ABM systems.

The recent arguments by Senator Nunn in support of the restrictive interpretation are built primarily on the contention that the Senate's consent to the ABM Treaty was predicated on that interpretation, and that the Senate's supposed perception of the agreement between the United States and the Soviet Union is more authoritative than what the parties actually agreed. That argument is fundamentally flawed. As I remember very well, the Senate did not focus on the question during the ratification process. Moreover, even if some Senators believed that the United States and the Soviet Union had agreed to the restrictive interpretation, those beliefs could not create binding bilateral obligations under the Treaty.

Some statements by Executive Branch officials during the ratification process tended to support the restrictive interpretaation of the Treaty, but those were entirely unilateral and contrary to the negotiating record. In any event, other statements were made by Excecutive Branch officials that were consistent with the broader interpretation. The Senate made no effort to resolve this issue. The Foreign Relations Committee report included only a brief statement concerning future ABM systems, which repeated the thrust of Secretary Rogers' official report; Secretary Rogers' report was consistent with the broader interpretation. Moreover, the Senate's resolution of advice and consent did not condition its consent in any way on the restrictive interpretation.

I believe that the best evidence of what the United States and the Soviet Union agreed to is in the Treaty text and the negotiating record. Both clearly support the broad interpretation of the Treaty. The United States cannot be bound to the restrictive interpretation when the Soviets refused to be so bound.

ADDITIONAL STATEMENT OF RICHARD N. PERLE

Mr. Chairman, I appreciate the opportunity to appear before the Committees on Foreign Relations and the Judiciary together with my friend and colleague Judge Sofaer. In nearly twenty years of government service I have always regarded deliberations of this nature with the utmost seriousness, attaching to them the high purpose of that essential collaboration between the Congress and the Executive that has enriched our public policy and our democratic institutions. There is a certain irony in my appearance here today as a representative of the Department of Defense. For it was my privilege fifteen years ago to participate in hearings on the very subject now before us as a member of the professional staff of the United States Senate. On that occasion I had the honor to assist Senator Henry Jackson in his effort to comprehend the meaning of the ABM Treaty, and to do so with the conscientious thoroughness for which he was so rightly admired by his Senate colleagues. Scoop's judgment that the Soviet Union would relentlessly exploit all of the latitude the treaty and the associated interim agreement allowed has been confirmed countless times since, often with consequences that have damaged our security and added greatly to the burden of defending our nation and our freedom. More than any of his colleagues, he realized that imprecision, ambiguity, and uncertainty as to the meaning of the rights and obligations undertaken through the treaty process would reward the Soviets with opportunities that would inevitably be denied to the United States. That is why much of the record of the ratification process was created by his probing and questioning of executive branch witnesses who sat in 1972 where Judge Sofaer and I sit today.

As the President's strategic defense initiative got underway after 1983, following more than a decade of neglect in the development of defensive technologies, the issue of precisely what activities the ABM Treaty prohibited became essential to the conduct of our program of research, development and testing. To this nation of laws it became urgent to understand the nature of the legal obligations that we and the Soviets assumed when, on May 26, 1972, President Nixon and General Secretary Brezhnev entered into a contract we called the Treaty on the Limitation of Anti-ballistic Missile Systems.

We undertook a systematic, deliberate and thorough review of the Treaty. Where the Treaty was unclear or ambigious or apparently contradictory we examined the record of the negotiations in order to understand precisely where agreement had been reached between the parties, where the parties differed, and how the compromises reached between us had been achieved and how they were to be understood. This review was conducted in good faith and with the integrity and conscientiousness that we who have taken solemn oaths of office are pledged to uphold.

We came to the conclusion that despite the desire on the part of our negotiators to conclude a treaty prohibiting the development and testing of certain new defensive technologies, the Soviets had failed to accept the proposals that would have obligated them as we wished. And the President decided accordingly that the ABM Treaty did not prohibit either of the parties from the conduct of development and testing of space-based systems and components based on what the Treaty refers to as "other physical principles".

We thus arrived at an interpretation of the Treaty that differed from the interpretation of most of the officials involved in the negotiations that culminated in the ABM Treaty.

Indeed, we concluded that statements made by officials of this administration that were based on the repetition of earlier statements made by officials of previous administrations, were seriously in error. And we sought to set the record straight.

Looking back one can only wish that we had been more rigorous, more probing, more effective in unearthing, in 1972, the understanding that we achieved only after the review to which I have referred, which was undertaken thirteen years later.

I hope that these Committees will study the Treaty and the negotiating record carefully. You will find contradictory statements. You will find ambiguity and imprecision. You will find conflicting testimony. You will find differences of opinion. You will find here as so often in matters of this sort that there is room for men of honor and integrity to differ over where the preponderance of the evidence lies. And you will find that rancor is no substitute for reason as you contemplate the arguments on both sides.

As you reflect on this crucial issue I urge you to apply a simple test in your deliberations. Ask yourselves this question: If the Soviets were to have tested a system or a component based on other physical principles in space, and if we were able to observe them doing so, how would they have responded if challenged under the treaty interpretation that was presented to the Senate by many officials in 1972? There is no doubt in my mind that they would have invoked Agreed Statement D from the Treaty. They would have insisted that they never agreed to prohibit such a test, that the Treaty itself and the negotiating record support the conclusion that the creation of systems and components based on other physical principles is permitted by the Treaty. And I have no doubt that we would have acquiesced just as we have done in other like cases.

What is really at issue is whether we will restrict ourselves in a manner that the Soviets would refuse to be restricted if they were in our position and we were in their's.

In a deeper sense the question before us is whether we will, by tying our hands in a manner that is neither necessary or wise, dash the hope that we might continue the SDI program in an efficient and effective manner. For adoption by the Congress of a restrictive statute prohibiting the development and testing upon which the success of the SDI program ultimately depends, will damage at once, and in time destroy, this vital program to defend against ballistic missiles.

We are, Mr. Chairman, at a critical stage in our negotiations with the Soviet Union. For more than six years we have sought to negotiate deep reductions in intermediate and strategic offensive weapons. We are closer now than we have ever been to achieving results that, until recently, seemed to many to be remote or even utopian. We have, within sight, an agreement virtually eliminating intermediate missiles from the arsenals of the Soviet Union and the United States. We are hard at work on an agreement that would reduce strategic weapons by one-half. We are in the final months, the home stretch, after six years of determined bargaining across the negotiating table in Washington and Moscow and Iceland and Geneva. If you now act to shackle the SDI, the most effective program we have, if you diminish the funding that keeps it going or encumber it with restrictions the Soviets never accepted and that we could not hope to verify, we will almost certainly fail.

I hope, Mr. Chairman, and I believe, that the Congress will give the President the strength he needs, the support he must have, the partnership our constitution has placed within reach, to finish the task before us.

PREPARED STATEMENT OF GERARD C. SMITH

Mr. Chairman, I am pleased to appear before this joint hearing to consider the meaning of one part of the ABM Treaty.

The Administration is promoting a "changed" interpretation. It is based on: a) the text of the Treaty; b) the negotiating and ratification records; and c) statements and the practice of the parties following ratification.

I will not touch on all of these issues. Senator Nunn has more than adequately addressed them in his testimony to this body and in speeches on the Senate floor. I find Senator Nunn's conclusions persuasive in categorically rejecting the Administration's analysis on all counts. and I understand that John Rhinelander, who was Legal Adviser to the SALT I delegation, is to testify later today.

Mr. Chairman, the Administration's novel interpretation seems to me to be entirely erroneous. It would remove all limitations on the development and testing of advanced or "exotic" ABM systems and components to be based in space or in any other mobile mode. It seems to rest on a rather absurd theory that while low technology is to remain controlled, high technology is left uncontrolled.

This interpretation would undermine the Treaty's basic purpose -- to prevent either side from deploying a nationwide defense or from preparing a base for such a defense, and it flies in the face of the unconditional ban on space weapon development and testing in Article V of the Treaty.

Mr. Chairman, I believe the changed interpretation is contrary to the clear language and intent of President Nixon's Treaty. During the negotiations I urged the President to seek qualitative limitations on ABM systems, arguing that limitations on future competition in ABM systems were far more important than specific quantitative limits placed on permitted ABM launchers, interceptors and radars. This principle of forestalling competition in new types of ABM systems was fundamental to the logic of this approach. We were obviously not seeking a temporary truce on ABMs until more effective futuristic systems could be developed. I thought one of the most significant accomplishments in SALT I was the freezing, in the infancy of basic research and development, of possible future generations of space-based and other mobile ABM systems.

It was the considered judgment of the Nixon Administration that development of a nationwide defense, whether based on then-existing technology or technology based on "other physical principles," would be contrary to our security interests. The ban in Article V on the development, testing, and deployment of space-based and other mobile ABM systems and components was designed precisely to avoid such a development, because ABM systems in these basing modes would all have an inherent nationwide defense potential. In August, 1971, President Nixon directed the SALT I delegation to get an effective ban on present and future ABM systems in these basing modes. That direction was carried out. Henry Kissinger has confirmed this in a recent conversation with me. If the SALT I delegation had not fully carried out the orders, the President would promptly have been heard from. He closely followed the negotiations and would surely have taken steps to have his orders obeyed.

Having achieved the categorical ban on space and other mobile systems, our attention focused on what activities were permitted for fixed land-based systems. Articles III and IV and Statement D addressed that issue. The Agreed Statement referred to possible fixed land-based systems based on other physical principles.

The Administration's new interpretation contradicts the understanding of all the U.S. delegates except Paul Nitze, who now works for the Administration and is a very recent convert to the new belief.

As Senator Nunn has recently and so persuasively demonstrated, the new interpretation is not consistent with the ratification record before the Senate. Inferences allegedly supporting the thesis that the Treaty permits space testing of exotics have been drawn from certain general remarks, but nowhere can the Administration find a single affirmative statement by any official to that effect. But the record contains a number of official statements to the contrary.

The new interpretation contradicts 13 years of established practice. In the years prior to the 1985 announcement of the reinterpretation, the Arms Control Impact Statements, transmitted to the Congress on behalf of several Administrations, consistently and unambiguously stated that the traditional (now sometimes called "narrow") interpretation of the ABM Treaty was the correct one.

The Administration claims the Soviet Union did not accept the U.S. view. It would have been highly unusual for the USSR to remain silent if it believed that the U.S. Government was making incorrect statements about what the USSR had agreed to. If the Administration was concerned about how the Soviet Union was interpreting the Treaty, why did it not resort to the Standing Consultative Commission established by the ABM Treaty for this very purpose, to seek confirmation that the Treaty applies to all ABM systems and components, whether based on 1972 technology or future technology.

The Administration has apprently not taken this route because it does not wish to have confirmation that the Soviets agreed to the Treaty's meaning as presented to the Senate. The Administration wants to adopt the new interpretation to remove the Treaty barrier that hinders the effort to try to develop comprehensive space-based strategic defenses. And if it must compromise a solemn international commitment in order to pursue this objective, it seems prepared to do so.

Mr. Chairman, the new interpretation is a bald attempt to rewrite history. The Congress should think long and hard about the central constitutional question involved in the President's assertion that the changed interpretation remains the formal understanding of the United States as to what is permitted by the ABM Treaty. Does the Executive Branch have a right unilaterally to amend a treaty the ratification of which has been consented to by the Senate? I think the Senate should clearly assert its views on this subject. The resolution now before this body seems to me to be a good initial approach. However, if the Administration insists on continuing its effort to implement the new interpretation if the Senate passes such a resolution, I believe the Congress should reinforce its position by prohibiting the expenditure of funds for programs going beyond the traditional interpretation of the Treaty as long as the Soviet Union does not mount such programs.

Thank you, and I will be pleased to answer questions.

PREPARED STATEMENT OF SENATOR DAN QUAYLE

Mr. President, two days ago, I said I had some new evidence indicating that the Soviets have always known the ABM Treaty was broad enough to let us research, test and develop space-based strategic defenses.

Before presenting that evidence, however, I would like to make a point which, unfortunately, has not been a part of our debate over this treaty -- a treaty, by the way, which has reduced our strategic defenses to a shambles in the past decade.

While we are considering limits we believe the treaty imposes on research, testing and development of anti-ballistic missile systems, we must also look very carefully at the ABM Treaty constraints the Soviets have acted under.

Because the Soviet Union is our partner in this nuclear deterrence pact. Their actions in the nuclear arena have a profound effect on our national security efforts.

To consider limiting our own strategic defenses under the ABM Treaty without considering how the Soviets have interpreted that very same treaty is not only foolish, it is dangerous to the welfare of this Nation.

When the United States signed the ABM and SALT I Treaties in 1972, we did so with the understanding and the hope that the Soviets would adhere to the concept of Mutual Assured Destruction.

Well, even a brief review of history shows that not only have the Soviets rejected MAD, a strong case can be made that they used both treaties to catch up to us in strategic defense technologies and to overtake us in the strategic offensive field.

The Soviets have liberally interpreted the ABM Treaty for years because, as even their public statements indicate, they place a high premium on strategic defenses.

It is for this reason that the Soviets have developed and deployed extensive strategic air defenses, two generations of ABM systems around Moscow and anti-tactical missile systems, even as we were abandoning our own strategic defense efforts.

Now, 15 years later, the Soviets have decided that the ABM Treaty, in fact, places very strict limits on certain types of strategic defenses. Why?

The answer to that question is contained in a letter to me that I believe contains evidence demonstrating just how blind our current debate is about the ABM Treaty.

Late last year, I met with our Deputy Defense and Space Group negotiator, Ambassador Henry Cooper, to talk about the Soviets' posture on the President's Strategic Defense Initiative.

What Ambassador Cooper had to say about the Geneva talks and the Soviets' interpretation of the ABM Treaty were astounding, so I asked him to put his observations in writing.

Three of the most significant points Ambassador Cooper made during our discussion were:

* One, that the Soviets were so convinced that the ABM Treaty did not limit the testing and development of futuristic, space-based defensive systems that they sought a separate accord to ban such activities.

* Two, that when the Soviets approached us two years ago with this proposal for a separate ban on space-based ABM systems, our negotiators in Geneva were genuinely perplexed because they assumed that such systems were already covered under the ABM Treaty.

• And three, that it was this Soviet proposal -- and our own confusion about it -- that sparked an intensive internal review of the ABM Treaty negotiating record by the Reagan administration.

As Ambassador Cooper noted: "Their proposed ban of space-based ABM systems ... puzzled us because it seemed redundant with existing U.S.-Soviet obligations under Article V of the ABM Treaty."

As a result, our internal review of the negotiating treaty was not, Ambassador Cooper noted, "undertaken out of the blue to 'torpedo the treaty,' as some have suggested."

It was only after a comprehensive review of the negotiating record that some light was shed on the puzzle.

"That review led to the conclusion that the Soviets never agreed to include ABM systems based on 'other physical principles' in the Article V prohibition," Mr. Cooper wrote to me.

In fact, the Soviets apparently agreed in 1972 to only one limit on such futuristic ABM systems: that neither side would deploy such a system without first negotiating an amendment to the treaty.

When the United States suggested in late 1985 that perhaps we would interpret the treaty broadly, the Soviets did an about face and demanded a quite restrictive interpretation of the treaty.

This Soviet move was understandable, Mr. Cooper noted, because "our decision to constrain the SDI program to be consistent with our previously held view of the terms of the treaty puts them in the best of all worlds.

"The U.S. has legitimized the 'broader interpretation' for them ... while continuing the narrow restraints on activities under the SDI program."

Finally, Mr. Cooper made one other point: that private conversations with Soviet negotiators have confirmed his belief that the Soviets have broadly interpreted the ABM Treaty for years.

This last point is one I think we need to keep firmly in mind as we continue our debate over the ABM Treaty and the limits it places on our SDI program.

Mr. President, I ask you: if the Soviets have aggressively developed ABM systems as a result of their own broad interpretation of the ABM Treaty, how can it possibly be in our own best interests to continue to interpret that same treaty narrowly?

I ask unanimous consent that the text of Ambassador Cooper's August 29, 1986, letter to me appear in the record immediately following these remarks.

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NOTE: For the text of Quayle's March 24 speech on "How the Soviets Have Interpreted the ABM Treaty," please see relesae 87;44 or page S 3725 of the Congressional Record for that date.

FOREIGN AFFAIRS COMMITTEE REPORT SHOWS SOVIET UNION SYSTEMATICALLY VIOLATED 45 PRIOR AGREEMENTS AND INTERNATIONAL TREATIES

HON. JOE L. EVINS

OF TENNESSEE

IN THE HOUSE OF REPRESENTATIVES

Tuesday, June 13, 1972

Mr. EVINS of Tennessee. Mr. Speaker, certainly we are all hopeful that the recent disarmament treaty signed by the United States and Russia will mark a real beginning of disarmament. However, a review of various international agreements and treaties with the Communist Government of the Soviet Union points to a history of flagrant violations and breaches of faith.

A report of the House Foreign Affairs Committee dated September 27, 1961, is one of the most startling documents citing the "grim record of the—Soviet Union" in international relations. The report cites 45 specific Soviet violations of international treaties and agreements.

This study is very timely in the light of the recent negotiations and agreements between the United States and U.S.S.R. While we all support the efforts of the President in this area, it is our earnest prayer that history does not again repeat itself. But, upon the record, one's faith is shattered.

Because of the interest of the Congress and the American people in this subject, I insert this report in the RECORD:

BACKGROUND INFORMATION ON THE SOVIET UNION IN INTERNATIONAL RELATIONS

I. SOVIET VIOLATIONS OF INTERNATIONAL TREATIES AND AGREEMENTS

> In war never tie your hands with considerations of formality. It is ridiculous not to know the history of war, not to know that a treaty is the means of gaining strength. . . . The history of war shows as clearly as clear can be that the signing of a treaty after defeat is a means of gaining strength. . . . Yes, of course, we are violating the [Brest-Litovsk] treaty; we have violated it thirty or forty times.—Lenin, *Selected Works*, Vol. VII, pp. 301, 309.

> A diplomat's words must have no relation to action—otherwise what kind of diplomacy is it? Words are one thing, actions another. Good words are a mask for the concealment of bad deeds. Sincere diplomacy is no more possible than dry water or iron wood.—Stalin, *Works*, Vol. II, p. 277.

A. Germany

The Soviet Union has systematically and flagrantly violated the wartime and postwar agreements concluded by the Allies to govern the administration of the occupation and rehabilitation of Germany. In addition to violating those parts of the agreements which were designed to ensure the peaceful, democratic, and balanced economic development of all Germany, the USSR has persistently sought to terminate unilaterally the rights of the Western Allies which resulted from the victory over Nazi Germany and which were formalized in numerous agreements concluded with the Soviet Government.

1. Democracy

The Potsdam Protocol of August 1, 1945 and subsequent decisions by the Allied Control Council guaranteed certain fundamental personal and political freedoms to the German people.

a. "The judicial system will be reorganized in accordance with the principles of democracy, of justice under law, and of equal rights for all citizens without distinction of race, nationality or religion." (Potsdam Protocol, II, 8)

b. "Subject to the necessity for maintaining military security, freedom of speech, press and religion shall be permitted, and religious institutions shall be respected. Subject likewise to the maintenance of military security, the formation of free trade unions shall be permitted." (Potsdam Protocol, II, 10)

These basic human freedoms have been consistently and flagrantly violated by the Soviet Union. The legal system was put on a political basis and thousands of people in the Soviet Zone were arrested and deported to the USSR or sent to concentration camps.

There is no freedom of speech or of the press in the Soviet Zone, and freedom of religion has been greatly limited, as in the USSR. Education has been subordinated to communist aims and principles. Soviet military forces cooperated with the East German regime in putting down the uprisings and strikes which occurred in June 1953. Until it was stopped by force, the flow of refugees escaping from the Eastern Zone gave evidence of the continuing denial of basic human freedoms to the people of East Germany.

c. "So far as is practicable, there shall be uniformity of treatment of the German population throughout Germany." (Potsdam Protocol, II, 3)

The Soviet-controlled East German authorities in June 1953 began an extensive program aimed at the complete isolation of the East German population from contact with the West and particularly with the population of West Germany. Soviet actions included closure of the interzonal frontier and prohibitions of visits of West Germans to the Soviet Zone except by special permits. The USSR created a 5-kilometer blocked zone along the frontier from which a substantial portion of the population, including entire villages, was forcibly evacuated. In Berlin carefully controlled traffic from the Soviet sector to the Western sectors continued until August, 1961, when the East German regime closed the Berlin sector border as tightly as the interzonal frontier.

d. Free exchange of printed matter and films was authorized in all occupation zones of Germany and Berlin. (Control Council Directive No. 55, June 25, 1947)

Soviet authorities have repeatedly barred from the Soviet Zone or Soviet sector of Berlin such materials originating in other zones.

e. "Local self-government shall be restored throughout Germany on democratic principles . . ." (Potsdam Protocol, II, 9, i)

f. "All democratic political parties with rights of assembly and of public discussion shall be allowed and encouraged throughout Germany." (Potsdam Protocol, II, 9, ii)

g. "The purposes of the occupation of Germany . . . are to prepare for the eventual reconstruction of German political life on a democratic basis and for eventual peaceful cooperation in international life by Germany." (Potsdam Protocol, II, 3, iv)

In April 1946 the Soviet authorities forced the merger of the Socialist Party of Germany with the Communist Party of Germany, forming the SED or Socialist Unity Party, with the aim of "capturing" the Socialist voters of Berlin and the East Zone. In June 1947 the Soviets "vetoed" the election of Ernst Reuter as Governing Mayor of Berlin and installed their representatives in the police who, operating under Soviet orders, openly defied the legally-elected Berlin government. On June 23, 1948, the Soviets ordered the SED to carry out riots around the City Hall of Berlin and brought the demonstrators to the scene in Russian Army trucks.

In East Germany the so-called German Democratic Republic was established in October 1949 by Soviet order, without prior discussion or free elections. The regime's first elections were held in 1950 under the "bloc-party" system and the National Front, a communist cover organization. In 1952, the USSR refused to grant entry into East Berlin and East Germany of a UN commission to investigate whether there were conditions conducive to free elections.

2. Economic Question

The Potsdam Protocol of August 1, 1945 provided for the treatment of Germany as a single economic unit, envisaged the equitable distribution of essential commodities between the various zones and limited excessive reparations.

a. "During the period of occupation Germany shall be treated as a single economic unit." (Potsdam Protocol, II, 14)

b. "To this end common policies shall be established in regard to . . . import and export programs for Germany as a whole . . . reparation and removal of industrial war potential, transportation and communications." (Potsdam Protocol, II, 14)

c. "Allied controls shall be imposed upon the German economy but only to the extent necessary . . . to ensure in the manner determined by the Control Council equitable distribution of essential commodities between the several zones so as to produce a balanced economy throughout Germany and reduce the need for imports." (Potsdam Protocol, II, 15)

On April 8, 1946, in the Allied Control Council's Economic Directorate, the Soviet Union stated that each zone should be responsible for its own trade. The USSR thereafter consistently refused to make a common import-export plan workable by submitting a plan for its own zone, even though the Control Council, on September 20, 1945, had approved the establishment of a common program.

d. "Payment of reparations should leave enough resources to enable the German people to subsist without external assistance." (Potsdam Protocol, II, 19)

e. ". . . industrial capital equipment . . . should be removed from the Western Zones of Germany in exchange for an equivalent value of food, coal, potash, zinc, timber, clay products, petroleum products, and such other commodities as may be agreed upon." (Potsdam Protocol, III, 4, a)

The USSR exploited and drained German resources in a manner not authorized by the Potsdam Protocol, took large amounts of reparations from current production, and absorbed a substantial part of German industry in the Soviet Zone into Soviet state-owned concerns. Although the United States had made 11,100 tons of reparations equipment available to the USSR by August 1, 1946, the Soviet Union did not live up to its agreement to ship goods in return to the Western zones of Germany.

The result of the Soviet violations of the agreement on reparations and the USSR's refusal to treat Germany as an economic unit was that the United States and the United Kingdom were obliged to give financial support to their zones in Germany to maintain a minimum economy. In effect, the United States, in shipping reparations to the Soviet Union while supporting its own zone to make up deficiencies caused by Soviet violations of the Potsdam Protocol, was permitting the USSR to collect reparations from the United States itself, rather than from Germany.

f. German external assets in Finland, Eastern Austria, Hungary, Bulgaria and Rumania were to be vested in the German External Property Commission. (Control Council Law No. 5, October 30, 1945)

The USSR directly appropriated German external assets in these countries without unvesting and assignment by the German External Property Commission.

g. In conformity with Paragraph 14 of the Potsdam Protocol, quadripartite legislation was enacted to provide tax uniformity and stabilization of wages in all zones. (Control Council Laws Nos. 12, February 11, 1946, and 61, December 19, 1947; Control Council Directive No. 14, October 12, 1945)

Soviet authorities permitted the *Land* governments of Brandenburg and Saxony-Anhalt to grant partial tax exemptions to large groups of wage and salary earners in violation of this legislation. This move was intended to stop the exodus of skilled workers to the western zones, to encourage qualified workers to take jobs in Soviet-owned factories, and to make propaganda claims about improved living standards of Soviet Zone workers.

3. Demilitarization

On repeated occasions during and after the war, the USSR agreed the demilitarization of Germany should be one of the cardinal aims of the occupation.

a. "The purposes of the occupation of Germany . . . are the complete disarmament and demilitarization of Germany . . ." (Potsdam Protocol, II, 3)

b. "All armed forces of Germany or under German control . . . shall be completely disarmed. . . . Detachments of civil police to be armed with small arms only, for the maintenance of order and for guard duties, will be designated by the Allied Representatives." (Declaration Regarding Defeat of Germany, June 5, 1945, Art. 2)

c. "All forms of military training, military propaganda and military activities of whatever nature, on the part of the German people are prohibited, as well as the formation of any organization initiated to further any aspect of military training and the formation of war veterans' organizations or other groups which might develop military characteristic or which are designed to carry on the German military tradition, whether such organizations or groups purport to be political, educational, religious, social, athletic or recreational or of any other nature." (Four Power Agreement on Additional Requirements to be Imposed on Germany, September 20, 1945, Section I, Paragraph 2)

In 1948 Soviet authorities began building up a sizable "police force" in the Soviet Zone. On May 23, 1950, the United States protested to the USSR against the remilitarization of the Soviet Zone, calling attention to the fact that some 40,000 to 50,000 men in so-called "Police Alert Units" were receiving basic infantry, artillery and armored training, and were equipped with Soviet military weapons.

By the end of 1953 the Soviet Zone had a "police force" of 100,000 men, supplemented by an additional 140,300 military personnel, including three mechanized divisions and an air force. By June 1959 East German military and paramilitary forces totaled more than 700,000 men.

In violation of the four-power occupation status of Berlin the USSR has allowed the presence of East German paramilitary units

and armament factories in East Berlin. Military parades have taken place annually on May Day in East Berlin. These violations were carried out during a period when the USSR itself still acknowledged the continuation of the four-power occupation status of Berlin. Until August 1961, the USSR had denied the existence of the four-power status of Berlin only during three brief periods in 1948, 1952, and 1958. Each time it reversed its position in response to strong western objections. Finally on August 13, 1961, East German armed forces, in flagrant violation of the quadripartite status of Berlin, entered Berlin and participated in the illegal closing of the border between the Soviet and Western sectors of the city.

4. Allied Occupation of Germany

In violation of wartime and postwar agreements, the Soviet Union has sought to destroy the organs established for the occupation of Germany and to deny to the Western Allies their rights stemming from the military conquest of Germany.

a. ". . . supreme authority in Germany will be exercised, on instructions from their Governments, by the Soviet, British, United States, and French Commanders-in-Chief, each in his own zone of occupation, and also jointly in matters affecting Germany as a whole. The four Commanders-in-Chief will together constitute the Control Council." (Four Power statement on control machinery in Germany, June 5, 1945, Paragraph 1)

On March 20, 1948, the Soviet commander unilaterally adjourned a meeting of the Council and abruptly walked out, thereby precipitating a rupture of its operations.

b. "The administration of the 'Greater Berlin' area will be directed by an Inter-Allied Governing Authority, which will operate under the general direction of the Control Council and will consist of four Commandants, each of whom will serve in rotation as Chief Commandant." (Four Power Statement on Control Machinery in Germany, June 5, 1945, Paragraph 7)

On June 16, 1948, the Soviet representative walked out of a meeting of the Inter-Allied Governing Authority (*Kommandatura*). On July 1, 1948, Soviet authorities announced that they would no longer participate in any meetings. These acts finally destroyed the quadripartite control machinery of Berlin.

c. [Occupation of Berlin will be carried out] . . . in accordance with arrangements between the respective commanders, including in these arrangements simultaneous movement of the national garrisons into Greater Berlin and provision of free access by air, road, and rail from Frankfurt and Bremen to Berlin for United States forces." (Letter of the President of the United States to Soviet Premier Stalin of June 14, 1945, to which Stalin replied on June 16, 1945: "On our part all necessary measures will be taken in Germany and Austria in accordance with the above stated plan".)

The Soviets imposed rail and road restrictions on Allied traffic to Berlin from the Western zones on April 1, 1948. The Allies inaugurated a "little airlift" which was expanded to a full airlift on June 26, 1948, two days after the Soviets imposed a total blockade. On July 1, 1948, the Soviet Chief of Staff of the USSR delegation to the Inter-Allied Governing Authority told his British, French, and American counterparts that four-power administration of Berlin no longer existed.

d. "All the restrictions imposed since March 1, 1948, by the Government of the Union of Soviet Socialist Republics on communications, transportation, and trade between Berlin and the Western zones of Germany and between the Eastern zone and the Western zones will be removed on May 12, 1949." (Quadripartite Agreement, New York, May 4, 1949, Paragraph 1)

e. ". . . in order to improve and supplement this and other arrangements and agreements as regards the movement of persons and goods and communications between the Eastern zone and the Western zone and between the zones and Berlin and also in regard to transit, the occupation authorities, each in his own zone, will have an obligation to take the measures necessary to insure the normal functioning and utilization of rail, water, and road transport for such movement of persons and goods and such communications by post, telephone, and telegraph." (Council of Foreign Ministers Communique, Paris, June 20, 1949, Paragraph 5)

On September 20, 1955, the USSR transferred to the East German regime control over road, railroad and air traffic in and out of Berlin in violation of the 1949 agreement. In December 1955, the Soviets threatened to interrupt the Berlin barge service, and higher tolls were levied on barges bound for Berlin in May 1956. Since January 13, 1960, the Soviet authorities have intermittently interfered with traffic between Berlin and Western Germany. On August 13, 1961 East German authorities put into effect several measures which had the effect of limiting, to a degree approaching complete prohibition, passage from the Soviet sector to the Western sectors of the city. These measures accompanied the closing of the sector boundary by a sizable deployment of police forces and by military detachments brought into Berlin for this purpose. This was a flagrant, and particularly serious, violation of the quadripartite status of Berlin and freedom of movement within that city guaranteed by the Quadripartite Agreement of New York of May 4, 1949 and by the decisions taken at Paris on June 20, 1949 by the Foreign Ministers of the Four Powers.

5. Prisoners of War

a. "German prisoners of war located in the territory of the Allied Powers and in all other territories will be returned to Germany on December 31, 1947." (Report of the Council of Foreign Ministers, April 23, 1947)

The Soviet Union reaffirmed this obligation in submitting its plan for repatriation on June 30, 1947. On January 3, 1949, the United States protested to the Soviet Union for its failure to furnish information on repatriation of war prisoners, noting that only 447,367 prisoners were known to have been repatriated out of the 890,532 war prisoners which Soviet Foreign Minister Molotov announced on March 12, 1947 were still in Soviet custody.

b. ". . . repatriation of war prisoners will be completed during 1949." (Soviet note of January 24, 1949.)

On May 5, 1950, the Soviet news agency TASS announced that the last group of German prisoners of war, numbering 17,538, had been repatriated. It added that 9,717 prisoners were still being held because they had been convicted of grave crimes and that in addition 3,815 were still being investigated. At this time it was estimated that the Soviet Government held more than 100,000 German prisoners, most of whom had been convicted on various pretexts to hard labor and were therefore no longer considered war prisoners. During the period from May 1950 to August 1955, some 11,000 German prisoners were released by the USSR, and following a special plea by the West German Government during the negotiations leading to the exchange of diplomatic representatives in September 1955, the Soviets released 11,000 additional prisoners. The Soviet Government has also refused to repatriate more than 100,000 German civilians deported during and after the war from East Germany and Eastern Europe. The United Nations Ad Hoc Commission on Prisoners of War reported in September 1957 that the Soviet Government had not even replied to a request to discuss further the prisoner-of-war issue.

6. Eastern Frontiers

Both the Yalta Agreement and the Potsdam Protocol stipulated that final delimitation of the German-Polish frontier should await a peace settlement with Germany.

a. ". . . the final delimitation of the Western frontier of Poland should thereafter await the Peace Conference." (Yalta Agreement, VII)

b. "The three Heads of Government reaffirm their opinion that the final delimitation of the western frontier of Poland should await the peace settlement." (Potsdam Protocol, VIII, B)

Immediately after this pledge was made, the USSR in effect recognized the Oder-Neisse line as the German-Polish frontier, allowing the Soviet-controlled Lublin Polish Government to occupy the land and evacuate the Germans who had been living there. On July 6, 1950, the Soviet-controlled governments of Poland and East Germany signed an agreement recognizing the Oder-Neisse line, in violation of the Yalta and Potsdam Agreements.

B. The Baltic States[1]

In direct violation of a series of treaties stretching over the entire interwar period from 1920 to 1939, the Soviet Union seized the Baltic countries of Lithuania, Latvia, and Estonia in the summer of 1940 and annexed them to the USSR.

1. The Peace Treaties

In 1920 the RSFSR[2] signed peace treaties with the Baltic states, recognizing their independence and defining the joint boundaries.

a. ". . . Russia unreservedly recognizes the independence and autonomy of the State of Estonia, and renounces voluntarily and forever all rights of sovereignty formerly held by Russia over the Estonian people. . . ." (Estonia-RSFSR Treaty of Peace, Tartu, February 2, 1920, Art. II)

b. ". . . Russia recognizes without reservation the sovereign rights and independence of the Lithuanian state, with all the juridical consequences arising from such recognition, and voluntarily and for all time abandons all the sovereign rights of Russia over the Lithuanian people and their territory." (Lithuania-RSFSR Treaty of Peace, Moscow, July 12, 1920, Art. I)

c. ". . . Russia unreservedly recognizes the independence and sovereignty of the Latvian state and voluntarily and irrevocably renounces all sovereign rights over the Latvian people and territory which formerly belonged to Russia. . . ." (Latvia-RSFSR Treaty of Peace, Riga, August 11, 1920, Art. II)

2. Nonaggression Pacts

All the Baltic States signed nonaggression pacts with the Soviet Union, which were renewed periodically up until 1939.

a. "The Lithuanian Republic and the Union of Soviet Socialist Republics mutually pledge themselves to respect, in all circumstances, the sovereignty and territorial integrity and inviolability of each other. Each of the Contracting Parties pledges itself to abstain from any aggressive actions whatsoever against the other Party." (Lithuania-USSR Treaty of Nonaggression, Moscow, September 28, 1926, Arts. II, III)

By virtue of additional protocols signed May 6, 1931 and April 4, 1934, the life of this treaty was extended until December 31, 1945. It was flagrantly violated by the secret protocol concluded by the USSR with Nazi Germany on September 28, 1939 which stipulated that the territory of Lithuania fell within the Soviet sphere of influence and allowed the USSR to "take special measures on Lithuanian territory to protect its interests."

b. "Each of the High Contracting Parties undertakes to refrain from any act of aggression directed against the other and also from any acts of violence directed against the territorial integrity and inviolability or the political independence of the other Contracting Party. . . . Each of the High Contracting Parties undertakes not to be a party to any military or political treaties, conventions or agreements directed against the independence, territorial integrity or political security of the other Party. . . ." (Latvia-USSR Treaty of Nonaggression, Riga, February 5, 1932, Arts. II, III)

An additional protocol signed in Moscow on April 4, 1934 extended the life of this treaty until December 31, 1945. A secret protocol of the Nazi-Soviet Pact of August 23, 1939 stipulated that Latvia was to be considered within the Soviet sphere of interest, in direct violation of the Soviet-Latvian nonaggression treaty.

c. "Both High Contracting Parties mutually guarantee the inviolability of the frontiers existing between them and established in the Treaty of Peace signed on February 2, 1920, and undertake to refrain from any act of aggression against each other . . . Each of the High Contracting Parties undertakes not to participate in any political agreements manifestly directed against the other Party in the sense of aggression . . . ." (Estonia-USSR Treaty of Nonaggression, Moscow, May 4, 1932, Arts I, II)

An additional protocol signed in Moscow on April 4, 1934 extended the life of this treaty until December 31, 1945. A secret protocol of the Nazi-Soviet Pack of August 23, 1939 stipulated that Estonia was to be considered within the Soviet sphere of interest, in direct violation of the Soviet-Estonian nonaggression treaty.

3. Renewed Soviet guarantees

On September 23, 1939, the Soviet Union compelled Estonia to sign a Treaty of Mutual Assistance. Latvia and Lithuania signed similar treaties on October 5 and 10, respectively. By the terms of these pacts, the USSR received leases on military bases and port installations and the right to maintain armed forces on the territories of the states concerned. At the same time, the Soviet Union guaranteed in these treaties the sovereignty of the Baltic States.

a. "The entry into force of this Pact shall in no way infringe upon the sovereign rights of the Contracting Parties, particularly their economic system and political structure." (Estonia-USSR Pact of Mutual Assistance, Moscow, September 28, 1939, Art. V)

b. "The entry into force of the present Pact must in no way affect the sovereign rights of the Contracting Parties, in particular their political structure, their economic and social system, and their military measures." (Latvia-USSR Pact of Mutual Assistance, Moscow, October 5, 1939, Art. V)

c. "Entry into force of this Pact shall not affect to any extent the sovereign rights of the Contracting Parties, in particular their state organization, economic and social systems, military measures and, in general, the principle of non-intervention in internal affairs." Lithuania-USSR Treaty of Mutual Assistance, Moscow, October 10, 1939, Art. VII)

4. The Molotov Pledge

In a speech to the USSR Supreme Soviet on October 31, 1939, Soviet Foreign Minister Molotov again guaranteed the sovereignty of the Baltic countries.

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[1] See also sec. IV. A, pt. 3, p. 84.

[2] The RSFSR (Russian Socialist Federal Soviet Republic) was superseded by the USSR on December 30, 1922.

"We stand for the scrupulous and punctilious observance of the pacts on the basis of complete reciprocity and we declare that all the nonsensical talk about the Sovietization of the Baltic countries is only to the interest of our common enemies." (*Pravda*, November 1, 1939)

On June 15 and 16, 1940, Soviet troops occupied Estonia, Latvia, and Lithuania. On July 21, the USSR forced the resignation of the governments of the three Baltic States and incorporated their territory into the USSR.

C. Finland

In direct violation of treaty obligations, the Soviet Union invaded Finland on November 30, 1939 without a declaration of war and attempted to establish a Soviet-controlled communist government in Finland, headed by former Comintern secretary Otto Kuusinen.

1. The Peace Treaty

By the Peace Treaty concluded on October 14, 1920, the Soviet Government recognized the independence and sovereignty of Finland.

"Whereas Finland declared its independence in 1917, and Russia has recognized the independence and the sovereignty of Finland within the frontiers of the Grand Duchy of Finland . . . the two powers shall mutually undertake to maintain, for the future, an attitude of peace and goodwill towards one another." (Finland-RSFSR Treaty of Peace, Dorpat, October 14, 1920, Preamble, Art. I)

2. The Nonaggression Treaty

The Nonaggression Treaty concluded on January 21, 1932 guaranteed the inviolability of Finnish territory.

"The High Contracting Parties mutually guarantee the inviolability of the frontiers existing between the Union of Soviet Socialist Republics and the Republic of Finland . . . and reciprocally undertake to refrain from any act of aggression directed against each other. Any act of violence attacking the integrity and inviolability of the territory or the political independence of the other High Contracting Party shall be regarded as an act of aggression, even if it is committed without declaration of war and avoids warlike manifestations." (Finland-USSR Treaty of Nonaggression, Helsinki, January 21, 1932, Arts. I, II)

By the Soviet-Finnish Protocol of April 7, 1934, this treaty was renewed until December 31, 1945. In October 1939, the Soviet Government presented to Finland a series of demands, including cession of territory and disarming of zones along the Finnish-Soviet border. The Finns were disinclined to accede to the Soviet "proposals" and negotiations reached a deadlock. On November 28, 1939, the USSR unilaterally abrogated the nonaggression pact and two days later invaded Finland without a declaration of war. Thirty Red Army divisions crossed the frontier. After heroic resistance against overwhelming odds, Finland capitulated and signed the Treaty of Peace of March 12, 1940. By its terms the USSR annexed the Karelian Isthmus and other Finnish territory.

D. Poland

In violation of Soviet treaty pledges of Polish sovereignty and territorial inviolability, Soviet troops invaded Poland in September 1939 in concert with German forces. The Soviet Union, in agreement with Nazi Germany, carried out the fourth partition of Poland. The pledges contained in the Yalta and Potsdam Protocols to establish a representative and democratic government in Poland after World War II were not adhered to by the USSR, which forced the Polish population to accept without free elections the Soviet-backed Lublin government.

1. Prewar Guarantees of Polish Sovereignty

The Soviet Union guaranteed Polish sovereignty and territorial inviolability in the Peace Treaty of 1921 and the Nonaggression Pact of 1932.

a. "Russia and the Ukraine abandon all rights and claims to the territories situated to the west of the frontier laid down by Article II of the present treaty. Each of the Contracting Parties mutually undertakes to respect in every way the political sovereignty of the other Party, to abstain from interference in its internal affairs, and particularly to refrain from all agitation, propaganda or interference of any kind, and not to encourage any such movement." (Poland-RSFSR Treaty of Peace, Riga, March 18, 1921, Arts. III, V)

b. "The two Contracting Parties . . . undertake to refrain from taking any aggressive action against or invading the territory of the other Party, either alone or in conjunction with other powers. . . . Each of the Contracting Parties undertakes not to be a party to any agreement openly hostile to the other Party from the point of view of aggression." (Poland-USSR Pact of Nonaggression, Moscow, July 25, 1932, Arts. I, III)

By virtue of an additional protocol signed on May 5, 1934 the Nonaggression Pact was extended to December 31, 1945. An additional joint statement of November 26, 1938 reaffirmed adherence to the Nonaggression Pact. Despite these assurances, on September 17, 1939, the USSR invaded Poland and on September 29, 1939 the Soviet Union concluded a treaty with Nazi Germany partitioning Poland. Polish territory was incorporated into the USSR. The Soviet Government cynically explained its aggression in the following words: "The Polish State and its Government have virtually ceased to exist. Treaties concluded between the Union of Soviet Socialist Republics and Poland have thereby lost their validity." On October 31, 1939, Soviet Foreign Minister Molotov, speaking to the Supreme Soviet of the USSR, in reporting the partition of Poland, bragged that, "a quick blow against Poland, first by the German Army and then by the Red Army, sufficed to leave nothing remaining of the ugly offspring of the Versailles Treaty."

2. Wartime Agreements

In 1941 the USSR signed agreements of mutual assistance with the Polish Government-in-Exile.

a. "The Government of the Union of Soviet Socialist Republics recognizes the Soviet-German Treaties of 1939 as to territorial changes in Poland as having lost their validity. The two Governments mutually agree to render one another aid and support of all kinds in the present war against Hitlerite Germany." (Poland-USSR Agreement on War Cooperation, London, July 30, 1941, Preamble, Art. III)

In December 1941 the USSR organized a Moscow-dominated Polish Government in the Soviet Union, known later as the Polish Committee of National Liberation or the Lublin Government. On April 25, 1943, the USSR severed relations with the Polish Government-in-Exile, and on July 26, 1944, the USSR established diplomatic relations with the Lublin Government.

b. "Soldiers serving in the Polish army on the territory of the Union of Soviet Socialist Republics shall be subject to Polish military laws and regulations."

"The armament, equipment, clothing, mechanical transport, etc. for the army shall as far as possible be furnished: (a) by the Government of the Union of Soviet Socialist Republics from its own stocks, (b) by the Government of the Polish Republic from supplies borrowed on the basis of the 'Lease and Lend' Bill. In this latter case the Government of the Union of Soviet Socialist Republics shall afford such help as is possible in the matter of transport. (Polish-Soviet Military Agreement, London, August 14, 1941)

The Soviets refused to give the promised rations and equipment to the Polish Army in the Soviet Union. The Polish troops under General Anders were finally evacuated to Iran. One of the most serious difficulties in forming the Polish Army resulted from the disappearance of 14,000-15,000 Polish officers known to have been in Soviet prisoner of war camps during the period of the Nazi-Soviet alliance. The bodies of 4,143 were found by the Nazis in 1943 in mass graves outside Katyn, where they had been massacred by the Soviet NKVD.

3. Agreements on Postwar Status of Poland

In complete violation of the Yalta and Potsdam Agreements, which called for the creation of a broadly-based representative government sanctioned by free elections, the USSR proceeded to force the pro-Soviet, Moscow-directed Lublin Government on the Polish people.

a. "The Provisional Government which is now functioning in Poland should therefore be reorganised as a broader democratic basis with the inclusion of democratic leaders from Poland itself and from Poles abroad. The Polish Provisional Government of National Unity shall be pledged to the holding of free and unfettered elections as soon as possible on the basis of universal suffrage and secret ballot. In these elections all democratic and anti-Nazi parties shall have the right to take part and to put forward candidates." (Yalta Protocol, VII)

That the Soviet Union had little intention of observing this agreement became evident almost immediately, when on April 21, 1945, it concluded a formal treaty of alliance with the Lublin Government. The USSR did everything it could to hinder the participation of non-communist Polish leaders in the discussions in Moscow which were intended to reorganize the provisional Polish government. Sixteen prominent Polish leaders were arrested and imprisoned when they attempted to attend these sessions.

b. "The Three Powers note that the Polish Provisional Government of National Unity, in accordance with the decisions of the Crimea Conference, has agreed to the holding of free and unfettered elections as soon as possible on the basis of universal suffrage and secret ballot in which all democratic and anti-Nazi parties shall have the right to take part and put forward candidates. . . ." (Potsdam Protocol, VIII, A)

The Polish Provisional Government was nominally a coalition, but in fact its key positions were occupied by pro-Soviet communists, who had established themselves during the period of "liberation" by the Red Army. Elections were postponed until January 19, 1947, in order to terrorize and eliminate the opposition. Of the 444 deputies elected to the Parliament in the elections, the Polish Peasant Party, which reportedly represented a large majority of the population, received only 28 seats. On January 5, 1947, the United States and the United Kingdom Governments requested the Soviet Government to join in approaching the Polish Government concerning the pledge of free elections contained in the Yalta and Potsdam Agreements. The Soviets refused. On January 28, 1947, the Department of State issued a press release stating that reports received from our Embassy in Poland immediately before and after the elections, based upon the observations of American officials, confirmed the fears of the United States Government that the elections would not be free.

E. Hungary

In violation of the Armistice Agreement, the Yalta and Potsdam Protocols, and the Peace Treaty with Hungary, the USSR refused to cooperate with the Allies in the rehabilitation of Hungary and installed a pro-Soviet government against the will of the Hungarian people and despite the protests of the Western Allies.

1. Occupation Arrangements

The Armistice Agreement and the Yalta and Potsdam Protocols provided for Allied cooperation in the establishment of democratic government in Hungary, sanctioned by free elections.

a. "For the whole period of the armistice there will be established in Hungary an Allied Control Commission which will regulate and supervise the execution of the armistice terms under the chairmanship of the representative of the Allied (Soviet) High Command and with the participation of representatives of the United Kingdom and the United States." (Armistice with Hungary, Moscow, January 20, 1945, Art. 18)

The Soviet representative on the ACC (Allied Control Commission) for Hungary consistently acted unilaterally in the name of the ACC without consultation or notice to his American and British colleagues, thus denying them any semblance of effective participation in the work of the ACC.

b. "The Premier of the Union of Soviet Socialistic Republics, the Prime Minister of the United Kingdom and the President of the United States of America have consulted with each other in the common interests of the peoples of their countries and those of liberated Europe. They jointly declare their mutual agreement to concert during the temporary period of instability in liberated Europe the policies of their three governments in assisting the peoples liberated from the domination of Nazi Germany and the peoples of the former Axis satellite states of Europe to solve by democratic means their pressing political and economic problems. . . . The three governments will jointly assist the people in any European liberated state . . . to form interim governmental authorities broadly representative of all democratic elements in the population and pledged to the earliest possible establishment through free elections of governments responsive to the will of the people . . ." (Declaration on Liberated Europe, Yalta Agreement, II)

In violation of the agreement, the USSR, acting through the Hungarian Communist Party and its own agencies and armed forces in Hungary, established a totalitarian regime contrary to the desires of the population. In June 1946 General Sviridov, Deputy Soviet Chairman of the ACC, without consulting the United States and United Kingdom ACC representatives, dissolved Catholic youth organizations. The Soviet Government rejected repeated United States proposals to join in tripartite examination of Hungary's economic problems and unilaterally imposed discriminatory economic agreements, including the establishment of joint Soviet-Hungarian companies. In February 1947 Soviet military police arrested Bela Kovacs, member of Parliament and former secretary general of the Smallholders Party. In May–June 1947 General Sviridov precipitated a political crisis enabling the Communist minority to force the resignation of Prime Minister Nagy.

c. "The three Governments agreed that the revision of the procedures of the Allied Control Commissions in these countries would now be undertaken, taking into account the interests and responsibilities of the three Governments which together presented the terms of armistice to the respective countries, and accepting as a basis, in respect of all three countries, the Soviet Government's proposals for Hungary as annexed hereto." (Potsdam Protocol, XI)

"During the period up to the conclusion of peace with Hungary the President (or Vice President) of the Allied Control Commission will regularly call conferences with the British and American representatives for the purpose of discussing the most important questions relating to the work of the Allied Control Commission. . . . Free movement by the American and British representatives in the country will be permitted. . . ." (Potsdam Protocol, Annex I, 1, 3)

Despite repeated requests, the USSR declined to discuss the revision of procedures for the Control Commissions as agreed at Potsdam. Instead, it continued to act unilaterally in the name of the Commissions in matters of substance without consultation with, or notice to, the United States and United Kingdom members. For example:

(a) Instructions were issued by the Soviet High Command regarding the size of the Hungarian Army without consulting the British or United States representatives.

(b) Without the knowledge of the United States, the Soviet deputy chairman of the ACC ordered the Hungarian Government to disband certain Catholic youth organizations in June-July 1946. He also recommended dismissal of certain government officials.

(c) In the fall of 1946 and without consulting the Americans or British, the Soviet element of the ACC gave permission to form the Hungarian Freedom Party.

(d) Early in 1947 the Hungarian police were ordered by the Soviet chairman in the name of the Allied Control Commission to suppress the publication of Count Ciano's diary.

(e) In early 1947 the Soviet chairman stated he had personally given approval to the Hungarian Government to resume diplomatic relations with certain countries in the name of the Allied Control Commission and without prior discussion with the British or Americans.

(f) In May 1947 the ACC chairman refused the United States permission to visit Hungarian Army units.

(g) Soviet authorities refused to permit free movement of the American element of the Allied Control Commission (also applicable to Bulgaria).

(h) The Soviets refused to transmit to the American representative data on the arrest of Bela Kovacs by the Soviet Army.

2. The Peace Treaty

By the terms of the Hungarian Peace Treaty, disputes over the execution of the treaty not settled by diplomatic negotiations were to be referred to the heads of the United States, United Kingdom, and Soviet diplomatic missions in Budapest.

"Excepting those instances covered by a special procedure stipulated in the present Treaty, any dispute concerning the interpretation or execution of this Treaty which is not settled by diplomatic negotiations shall be referred to the Three Heads of Mission. . . ." (Hungarian Peace Treaty, February 10, 1947, Art. 40)

On May 31, 1949, the United States requested the United Kingdom and the USSR to hold a meeting of the three heads of mission in Budapest to settle the dispute over Hungarian noncompliance with article 2 of the treaty—the so-called human-rights clause. The Soviet Union, in its note of June 11, 1949, refused to participate in the meeting. A second United States note, delivered on June 30, 1949, expressed regret over the Soviet Union's disregard of the provisions of the treaty and asserted that the existence of a dispute between the United States and Hungary could not be questioned. In a memorandum dated July 19, 1949, the Soviet Union reaffirmed its contention that no basis existed for a meeting of the three heads of mission. Since that time the Soviet Union has consistently refused to participate in such a meeting.

3. The Hungarian Uprising

Proof of the anti-popular nature of the regime installed in Hungary by the USSR in violation of the Declaration on Liberated Europe (Yalta Protocol) was furnished by the anti-government revolt of October-November, 1956. The Soviet intervention and kidnaping of Hungarian Premier Imre Nagy violated the Charter of the United Nations, the Soviet Government pledge of October 30, 1956, and the assurances of safe conduct given to Nagy by the Kadar regime.

a. "We the peoples of the United Nations, determined . . . to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims." (Charter of the United Nations, Preamble, ratified by the USSR on October 24, 1945)

b. "Having in mind that the further presence of Soviet military units in Hungary could serve as an excuse for further aggravation of the situation, the Soviet Government has given its military command instructions to withdraw the Soviet military units from the city of Budapest as soon as this is considered necessary by the Hungarian Government." (*Pravda*, October 31, 1956)

On November 4, 1956, Soviet troops entered Budapest and brutally put down the rebellion of the Hungarian people against Soviet domination and Soviet communism. On September 14, 1957, the United Nations General Assembly adopted a resolution which endorsed the report of the Special Committee on the Problem of Hungary. The report confirmed that: "(a) the Union of Soviet Socialist Republics, in violation of the Charter of the United Nations, has deprived Hungary of its liberty and political independence and the Hungarian people of the exercise of their fundamental human rights; (b) the present Hungarian regime has been imposed on the Hungarian people by the armed intervention of the Union of Soviet Socialist Republics; (c) the Union of Soviet Socialist Republics has carried out mass deportations of Hungarian citizens to the Union of Soviet Socialist Republics; (d) the Union of Soviet Socialist Republics has violated its obligations under the Geneva Conventions of 1949; (e) the present authorities in Hungary have violated the human rights and freedoms guaranteed by the Treaty of Peace with Hungary." The resolution then called upon "the Union of Soviet Socialist Republics and the present authorities in Hungary, in view of evidence contained in the report, to desist from repressive measures against the Hungarian people, to respect the liberty and political independence of Hungary and the Hungarian people's enjoyment of fundamental human rights and freedoms, and to ensure the return to Hungary of those Hungarian citizens who have been deported to the Union of Soviet Socialist Republics. . . ."

On November 22, 1956, deposed Premier Nagy was seized by Soviet authorities after leaving the Yugoslav Embassy in Budapest. This was done in violation of an agreement concluded on November 21 between Yugoslav officials and the Soviet-sponsored Kadar regime in Hungary. The Yugoslavs protested the abduction in notes to the Kadar government and the Soviet Union on November 24. As late as December 12, 1959, the General Assembly of the United Nations adopted another resolution in which it deplored the continued refusal of the USSR and the regime in Hungary to cooperate with it to achieve the objectives of the United Nations in accordance with its resolutions in regard to Hungary; deplored the continuing repression of the fundamental rights of the Hungarian people and their lack of freedom of political expression under the continuing presence of the Soviet armed forces; denounced the execution of Imre Nagy, Gen. Pal Maleter, and other Hungarian patriots; and condemned the continued defiance of the resolutions of the General Assembly of the United Nations of which the USSR and Hungary are members. It also called upon the USSR and the present Hungarian government to desist from repressive measures against the Hungarian people and to respect the liberty and political independence of Hungary and the Hungarian people's enjoyment of fundamental human rights and freedoms.

F. Rumania

During the period of the Nazi-Soviet alliance, the USSR annexed parts of Rumania. After World War II the USSR violated the Armistice Agreement, the Yalta and Potsdam Protocols, the Foreign Ministers Agreement of December, 1945, and the Peace Treaty with Rumania in refusing to cooperate with the Allies in the democratic rehabilitation of Rumania.

1. Prewar Guarantee of Sovereignty

Upon establishment of diplomatic relations, the USSR guaranteed full respect for Rumanian sovereignty.

"The Governments of our countries mutually, fully and integrally guarantee to respect the sovereignty of both countries and to abstain from any direct or indirect interference in the internal affairs and development of one another and especially from any kinds of agitation, propaganda, intervention or support of them." (Exchange of Notes, Rumania-USSR, Geneva, June 9, 1934)

In agreement with Nazi Germany, the USSR, on June 26, 1940, invaded Rumanian territory. Soviet forces occupied Bessarabia and Northern Bukovina and annexed them to the USSR.

2. Occupation Arrangements

The Armistice Agreements, the Yalta and Potsdam Protocols, and the Foreign Ministers Agreement of December 1945 provided for Allied cooperation in the establishment of democratic governments in Rumania, sanctioned by free elections.

a. "An Allied Control Commission will be established which will undertake until the conclusion of peace the regulation of and control over the execution of the present terms under the general direction and orders of the Allied (Soviet) High Command." (Armistice with Rumania, September 12, 1944, Art. 18)

The Soviet general who was Chairman of the Allied Control Commission in Bucharest failed to consult the United States and British representatives in issuing orders in the name of the ACC.

b. "The Three Powers . . . jointly declare their mutual agreement to concern during the temporary period of instability in liberated Europe the policies of their three governments in assisting the peoples liberated from the domination of Nazi Germany and the peoples of the former Axis satellite states of Europe to solve by democratic means their pressing political and economic problems." (Declaration on Liberated Europe, Yalta Agreement, II)

c. "The three Governments take note that the Rumanian Government thus reorganised should declare that free and unfettered elections will be held as soon as possible on the basis of universal and secret ballot. All democratic and anti-fascist parties should have the right to take part in these elections and to put forward candidates. The reorganised Government should give assurances concerning the grant of freedom of the press, speech, religion and association." (Foreign Ministers Agreement, December 24, 1945, V)

In February 1945 Soviet Deputy Foreign Minister Vyshinsky arrived in Bucharest to dictate the dismissal of the Radescu Government and the imposition of the communist-dominated Groza regime. Soviet authorities again directly interfered during the Rumanian elections of November 1946. Soviet troops were used to break up meetings of the opposition and disrupt orderly election procedures. In December 1946, the USSR refused to accept a proposal by the United States and United Kingdom to establish a joint commission to study the economic situation in Rumania. Meanwhile, the Soviets continued to treat Rumania as a colony of the USSR by use of Soviet-controlled joint companies, excessive reparations exactions and one-sided commercial agreements.

d. "The three Governments agreed that the revision of the procedures of the Allied Control Commission in these countries would now be undertaken taking into account the interests and responsibilities of the three Governments which together presented the terms of armistice to respective countries. . . ." (Potsdam Protocol, XI)

Despite repeated requests, the USSR refused to consult on the procedural revision of the ACC and continued unilaterally throughout the armistice period to refuse participation in ACC operations to the United States and the United Kingdom. The Soviet ACC representative issued directives to Rumanian authorities without the agreement of United States and United Kingdom representatives, sometimes in the face of United States and United Kingdom protests, and often without notification or discussion. The Soviets also obstructed the entrance of official United States personnel and aircraft into Rumania.

3. The Peace Treaty

By the terms of the Rumanian Peace Treaty, disputes over the execution of the treaty not settled by diplomatic negotiations were to be referred to the heads of the United States, the United Kingdom, and Soviet diplomatic missions in Bucharest. Soviet troops were allowed to remain only to safeguard communication line to occupation forces in Austria.

a. "Heads of the Diplomatic Missions in Bucharest of the Soviet Union, the United Kingdom, and the United States of America, acting in concert, will represent the Allied and Associated Powers in dealing with the Rumanian Government in all matters concerning the execution and interpretation of the present treaty. . . . Any dispute concerning the interpretation or execution of the treaty which is not settled by diplomatic negotiations shall be referred to the three heads of the mission." (Rumanian Peace Treaty, February 10, 1947, Arts. 37, 38)

Contrary to these provisions, the Soviet Government has consistently refused to cooperate with the American and British chiefs of mission in Bucharest and has in consequence reduced the treaty, repeatedly violated by the Rumanian Government, to a dead letter.

On May 4, 1948, the American Minister to Bucharest requested that an early meeting of the heads of the diplomatic missions in Bucharest be arranged to consider the implementation of the military clauses of the Treaty of Peace with Rumania. Both the Soviet and British chiefs of mission agreed to the meeting, which was scheduled for May 18, 1948. However, the Soviet Ambassador canceled the scheduled meeting, saying he was indisposed. On May 26, 1948, he informed the American Minister that there was no necessity for the proposed meeting and no grounds for putting the proposal into effect.

b. "Upon entry into force of this present Treaty all allied forces are to leave Rumania in 90 days, while the Soviet Union retains the right to keep such armed forces on Rumanian territory as are necessary to maintain lines of communication of the Soviet Army with the Soviet zone of occupation in Austria." (Rumanian Peace Treaty, February 10, 1947, Art. 21)

Soviet troops remained in Rumania after signature of the Austrian Peace Treaty and withdrawal of occupation forces from Austria. On April 15, 1957 the USSR and Rumania reached a new agreement sanctioning the stationing of Soviet troops in Rumania.

G. Bulgaria

The USSR violated the Armistice Agreement, the Yalta and Potsdam Protocols, the Foreign Ministers Agreement of December 1945, and the Peace Treaty with Bulgaria in refusing to cooperate with the Allies in the democratic rehabilitation of Bulgaria.

1. Occupation Arrangements

The Armistice Agreement, the Yalta and Potsdam Protocols, and the Foreign Ministers Agreement of December 1945 provided for Allied cooperation in the establishment of democratic government in Bulgaria, sanctioned by free elections.

a. "For the whole period of the armistice there will be established in Bulgaria an Allied Control Commission which will regulate and supervise the execution of the armistice terms under the chairmanship of the representative of the Allied (Soviet) High Command, and with the participation of representatives of the United States and the United Kingdom." (Armistice with Bulgaria, October 28, 1944, Art. 18)

The Soviet chairman of the ACC repeatedly took unilateral action in the name of the ACC and without consultation with his United States or United Kingdom colleagues, thus effectively negating United States and United Kingdom participation.

b. "The Government of Bulgaria will restore all property of the United Nations and their nationals, including Greek and Yugoslav, as may be determined later. The Government of Bulgaria will restore all rights and interests of the United Nations and their nationals in Bulgaria." (Armistice with Bulgaria, October 28, 1944, Arts. 9, 10)

The USSR has aided and abetted the Bulgarian Government's failure, in varying degrees, to fulfill these provisions of the armistice. The Soviets have refused to consider with the United States and United Kingdom Bulgaria's obligation to restore and restitute United Nations property and interests. While deliveries of foodstuffs were made to the Yugoslavs unilaterally, the USSR blocked three-power consideration of amounts to be shipped to Greece. None was shipped to that country.

c. "The Three Powers . . . jointly declare their mutual agreement to concert during the temporary period of instability in liberated Europe the policies of their three governments in assisting the peoples liberated from the domination of Nazi Germany and the peoples of the former Axis satellite states of Europe to solve by democratic means their pressing political and economic problems." (Declaration on Liberated Europe, Yalta Agreement, II)

d. "It is understood by the three Governments that the Soviet Government takes upon itself the mission of giving friendly advice to the Bulgarian Government with regard to the desirability of the inclusion in the Bulgarian Government of the Fatherland Front, now being formed, of an additional two representatives of other democratic groups, who (a) are truly representative of the groups of the parties which are not participating in the Government and (b) are really suitable and will work loyally with the Government." (Foreign Ministers Agreement, December 27, 1945, VI)

The Soviet Government, through the Bulgarian Communist Party, unilaterally subverted representative democratic processes in Bulgaria and assisted in denying the Bulgarian people the exercise of fundamental freedoms. In February 1945 the Soviet head of the Allied Control Commission in Sofia openly interfered in the internal affairs of Bulgaria's largest political party by demanding and obtaining the replacement of Dr. G. M. Dimitrov as Secretary General of the Agrarian Union. Soviet authorities in Bulgaria did not honor the Foreign Ministers Agreement and prevented the broadening of the Bulgarian Government.

e. "The three governments agreed that the revision of the procedures of the Allied Control Commissions in these countries would not be undertaken, taking into account the interests and responsibilities of the three governments which together presented the terms of armistice to the respective countries . . ." (Potsdam Protocol, XI)

The Soviet Government refused repeated United States and United Kingdom requests to consult as agreed. It continued to operate the Allied Control Commissions unilaterally without effective participation of or even, on occasion, knowledge of the United States and United Kingdom members.

2. The Peace Treaty

The Bulgarian peace treaty provided that disputes on the interpretation or execution of the treaty not settled by direct diplomatic negotiations should be referred to the three heads of mission in Sofia.

"Excepting those instances covered by a special procedure stipulated in the present Treaty, any dispute concerning the interpretation or execution of this Treaty which is not settled by diplomatic negotiations shall be referred to the Three Heads of Mission . . ." (Bulgarian Peace Treaty, February 10, 1947, Art. 36)

On May 31, 1949, the United States requested the United Kingdom and the USSR to convene a meeting of the three heads of missions in Sofia to settle the dispute over Bulgarian noncompliance with article 2 of the peace treaty. The Soviet Union, in its note of June 11, 1949, refused to convene the three heads of mission with the excuse that it "did not see any grounds for convening." The USSR in the same note declared that "not only are the measures [of the Bulgarian Government] concerning which the United States of America has expressed its dissatisfaction not a violation of the peace treaty, but on the contrary are directed toward the fulfillment of the said treaties which obligate the said countries to combat organizations of the fascist type." The United States note of June 30, 1949, confirmed the existence of a dispute between Bulgaria and the United States over the peace treaty. The Soviet memorandum of July 19, 1949, reaffirmed the Soviet contention that no basis for a meeting existed. The Soviet Union has consistently maintained its obduracy on this matter.

H. Czechoslovakia

The USSR violated the 1935 Pact of Mutual Assistance, the Atlantic Charter, and the 1943 Agreement with the Czechoslovakia Government-in-Exile by collaborating with the German Nazi regime during the 1939–41 period, by annexing Czechoslovak territory in 1945, and by intervening in Czechoslovak domestic politics to institute a pro-Soviet communist government in the early postwar period.

1. The 1935 Pact of Mutual Assistance

By the terms of this pact, the USSR pledged not to aid or enter agreements with countries committing aggression against Czechoslovakia.

". . . It is stipulated that should either of the High Contracting Parties become the object of an aggression on the part of one or more third powers in conditions not giving ground for aid or assistance within the meaning of the present Treaty, the other High Contracting Party undertakes not to lend, for the duration of the conflict, aid or assistance, either directly or indirectly, to the aggressor or aggressors. Each High Contracting Party further declares that it is not bound by any other agreement for assistance which is incompatible with the present undertaking." (Czechoslovakia—USSR Treaty of Mutual Assistance, Moscow, June 8, 1935, Art. IV)

Subsequent to the signing of the Nazi-Soviet Pact on August 23, 1939, which recognized the Nazi conquest of Czechoslovakia, the USSR provided economic assistance to Nazi Germany and directed the Czechoslovak Communist Party to agitate against the legal government of Czechoslovakia.

2. The Atlantic Charter

Soviet adherence to the Atlantic Charter pledged the USSR not to seek territorial aggrandizement.

". . . their countries seek no aggrandizement, territorial or other; they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned." (Atlantic Charter, August 14, 1941, Soviet adherence September 24, 1941)

In the July 1945 Treaty of Moscow, the USSR forced the Czechoslovak Government to agree to the Soviet annexation of the Carpatho-Ukraine, which was then incorporated into the Ukrainian Soviet Republic.

3. Friendship Agreement

By the terms of a friendship agreement concluded with the Czechoslovak Government-in-Exile in 1943, the USSR pledged postwar collaboration, guaranteed Czechoslovak sovereignty, and promised not to intervene in Czechoslovak internal affairs.

"The High Contracting Parties, considering the interests of the security of each of them, agree to maintain close and friendly collaboration in the period after the re-establishment of peace and to act in conformity with the principles of mutual respect for their sovereignty as well as of non-intervention in internal affairs of the other state." (Treaty of Friendship, Mutual Assistance and Post-War Collaboration, December 12, 1943, Art. 4)

During the immediate postwar period the Soviet Union did intervene in Czechoslovak internal politics to secure the establishment of a pro-Soviet communist government. The USSR actively aided the communist minority and Soviet agents worked clandestinely in the Czechoslovak Ministry of Interior under the guise of Czechoslovak communists. During the February 1948 crisis, Soviet troops surrounded four-fifths of the Czechoslovak frontiers and Soviet agents participated in meetings and demonstrations and were among the armed militia in the streets of Prague. Soviet Deputy Foreign Minister Zorin was in Prague to direct the communist takeover.

I. Iran

In direct violation of numerous prewar and wartime treaties, the USSR, in 1945, promoted rebellion in the northern area of Iran occupied by Soviet troops. By delaying the withdrawal of Soviet troops and by arming the rebels, the USSR attempted to establish Azerbaijan and Kurdish republics in Iran, which could be absorbed into the USSR.

1. Prewar Agreements

Treaties signed in 1921 and 1927 pledged Soviet respect for Iranian sovereignty and territorial integrity.

a. "In consideration of the fact that each nation has the right to determine freely its political destiny, each of the two contracting parties formally expresses its desire to abstain from any intervention in the internal affairs of the other." (Soviet-Iranian Treaty of Friendship, February 26, 1921, Art. IV)

b. "Each of the High Contracting Parties undertakes to refrain from any aggression and from any hostile acts directed against the other party, and not to introduce its military forces into the territory of the other party. . . . [They undertake] not to encourage or to allow in their respective territories the formation or activities of: (1) organizations or groups of any description whatever, whose object is to overthrow the Government of the other contracting party by means of violence, insurrection or outrage; (2) organizations or groups usurping the office of the Government of the other country or of part of its territory, also having as their object the subversion of the Government of the other contracting party by the above mentioned means, a breach of its peace and security, or an infringement of its territorial integrity." (Soviet-Iranian Treaty of Non-aggression and Neutrality, October 1, 1927, Arts. II, IV)

2. Wartime Agreements

By the terms of the Tripartite Treaty of 1942 and the Declaration of Tehran, Soviet troops were to be withdrawn from Iran not later than six months after the defeat of Nazi Germany and the USSR guaranteed once more Iranian sovereignty and territorial integrity.

a. "The forces of the Allied Powers shall be withdrawn from Iranian territory not later than six months after all hostilities between the Allied Powers and Germany and her associates have been suspended by the conclusion of an armistice or armistices or on the conclusion of a peace treaty between them, whichever date is the earlier." (Treaty of Alliance Between the United Kingdom, the Soviet Union, and Iran, January 29, 1942, Art. V)

b. "The Goverments of the United States, the Union of Soviet Socialist Republics and the United Kingdom are at one with the Government of Iran in their desire for the maintenance of the independence, sovereignty, and territorial integrity of Iran." (Declaration of Tehran, December 1, 1943)

c. "As regards the complete withdrawal of Soviet troops from Iran, the Soviet Government, as you are aware, takes the view that this withdrawal of troops should be effected within the period laid down in the Anglo-Soviet-Iranian Treaty." (Letters of Soviet Foreign Minister Molotov, September 20, 1945)

In direct violation of this long series of agreements, the Soviet Union began to promote a rebellion in the northern area of Iran occupied by Soviet troops in the fall of 1945. In the Iranian province of Azerbaijan rebels were equipped with Soviet arms, led by the Iranian communist Pishevari and aided by Soviet agents who crossed into Iran. On December 12, 1945, the rebels proclaimed the Autonomous Republic of Azerbaijan. Red Army troops provided full protection and prevented Iranian troops from reaching the scene. Shortly afterwards rebels in the neighboring Kurdish province, carrying Soviet arms and wearing Soviet uniforms, proclaimed an independent Kurdish republic in Azerbaijan. Pishevari broadcast his thanks to the Red Army for its assistance. In spite of an appeal by the Iranian Government to the United Nations, the rebels remained in control and Soviet troops failed to leave by the agreed date of March 2, 1946.

Red Army forces were withdrawn from Iran only after Iranian Premier Qavam had gone to Moscow and, under duress, had agreed to the withdrawal of the Iranian complaint before the United Nations, to the admission of three communists to his cabinet, and to the establishment of a joint Soviet-Iranian oil company (the USSR holding 51 percent of the stock) for exploitation of oil in northern Iran. Although the Iranian Premier was subsequently able to dismiss the communists from his cabinet, cancel the joint oil agreement, and send Iranian troops to put down the rebels in the North, Soviet interference in Iranian internal affairs and pressure on the government has continued. Soviet broadcasts to Iran have repeatedly attacked the Iranian Government, incited the Iranian people to violent action against it, and supported the illegal pro-Soviet Tudeh Party. The Soviet military attaché, General Rodionov, was implicated in the Tudeh conspiracy in the Iranian army and air force that was uncovered in August and September 1954.

J. Turkey

In violation of prewar agreements, the USSR attempted to obtain territorial concessions from Turkey in the early postwar period and intervened in Turkish internal affairs in efforts to intimidate and weaken the Turkish Government.

1. Treaty of Friendship

The Soviet-Turkish Treaty of Friendship of 1921 restored Turkish sovereignty over the territory of Kars and Ardahan.

"The northeast frontier of Turkey . . . follows the former northern administrative frontiers of the sanjaks of Ardahan and Kars . . ." (RSFSR[9] Turkey Treaty of Friendship, Kars, October 13, 1921, Art. IV).

2. Nonaggression Pact

The USSR pledged to abstain from aggression and not to participate in any hostile acts directed against Turkey.

"Each Contracting Party undertakes to abstain from any aggression against the other. . . . Furthermore, each of the two Contracting Parties undertakes not to participate in any hostile act by one or more other powers directed against the other Contracting Party." (Treaty of Friendship and Neutrality, Paris, December 17, 1925, Art. II)

This treaty was renewed on December 17, 1929 and again on November 7, 1935. It was unilaterally denounced by the USSR on on March 19, 1945. In June 1945, Soviet Foreign Minister Molotov demanded that Turkey cede to the Soviet Union a base on the Black Sea Straits and the districts of Kars and Ardahan. This demand was echoed by two Georgian historians in December 1945 in an open letter in which they argued that Kars, Ardahan, and other East Turkish districts had belonged to Georgia in the Middle Ages. In a vigorous note of August 8, 1946, Soviet Foreign Minister Molotov charged the Turkish Government with violations of the Montreaux Convention and demanded concessions which would establish Soviet control of the Straits at the expense of the Turks. The Turkish Government was able to resist Soviet pressure only by the intervention of the Western Allies and by the declaration of the Truman Doctrine on March 12, 1947.

K. Afghanistan

In violation of prewar treaties of neutrality and nonaggression, the USSR forced Afghanistan to cede territory and intervened in the internal affairs of Afghanistan during the postwar period.

a. "Each of the Contracting Parties undertakes to abstain from all kinds of aggression against the other. . . ." (Afghanistan-USSR Treaty of Neutrality and Non aggression, August 31, 1926, Art. II)

b. "The High Contracting Parties, having recognized each other's sovereignty, undertake to abstain from any armed or unarmed intervention in the internal affairs of the other Contracting Party. . . ." (Treaty of Neutrality and Nonaggression, June 24, 1931, Art. III)

The treaty of 1931 was renewed by the Protocol of March 29, 1936. In March 1946, Afghan officials uncovered a Soviet plot led by Soviet agents to incite the Tajik minority to open rebellion and eventual union with the USSR. That the Soviet Union eventually hoped to turn Afghanistan into a protectorate was shown by its repeated violent objections to United Nations and Western aid to Afghanistan during the immediate postwar period and by its demands that Afghanistan grant the USSR a special place in economic developmental schemes and trade.

L. China

In direct violation of the 1924 Sino-Soviet Agreement on General Principles, the Kellogg-Briand Pact and the 1937 Nonaggression Pact, the USSR repeatedly intervened in Chinese affairs prior to World War II and recognized Japanese violations of Chinese sovereignty in Manchuria. The USSR also violated wartime agreements of cooperation with Nationalist China to the advantage of the Chinese Communists.

1. Prewar Agreements

The 1924 and 1937 Sino-Soviet Pacts provided for Soviet respect of Chinese sovereignty and territory integrity. By adhering to the Kellogg-Briand Pact, the USSR formally pledged to renounce force in the settlement of disputes.

a. "The Governments of the two Contracting Parties mutually pledge themselves not to permit, within their respective territories, the existence and/or activities of any organization or groups whose aim is to struggle by acts of violence against the Government of either Contracting Party. The Government of the Union of Soviet Socialist Republics agrees to renounce the special rights and privileges relating to all concessions in any part of China acquired by the Tsarist Government . . ." (Sino-Soviet Agreement on General Principles, May 31, 1924, Arts VI, X)

b. "War should be renounced as an instrument of national policy, and the settlement of disputes should never be sought except by peaceful means." (Kellogg-Briand Pact, August 27, 1928, adhered to by the USSR September 27, 1928)

The USSR was the first major power to break its obligations under the Kellogg-Briand Pact. In October and November 1929, Soviet troops, supported by aircraft and gunboats, invaded Manchuria in order to seize control of the Chinese Eastern Railway. The Soviet Government rebuffed all Chinese attempts to settle the dispute over the railway by diplomatic means, preferring to employ its clearly superior military power to force a settlement on its own terms. Efforts by the United States and other Western powers to invoke the Kellogg-Briand Pact and to encourage a settlement by peaceful means were brusquely rejected by the Soviet Government.

c. "In the event that either of the High Contracting Parties should be subjected to aggression on the part of one or more third powers, the other Contracting Party obligates itself . . . to refrain from taking any action or entering into any agreement which may be used by the aggressor or aggressors to the disadvantage of the Parties subjected to aggression." (Sino-Soviet Treaty of Nonaggression, August 21, 1937, Art. I)

This agreement was violated by the Soviet signature of a "neutrality pact" with Japan on April 13, 1941.

2. Wartime Agreements

The Sino-Soviet Treaty of Friendship and Alliance of 1945 and related agreements provided for mutual political and economic cooperation and recognition of sovereignty.

a. "The High Contracting Parties, having regard to the interests and security and economic development of each of them, agree to work together in close and friendly collaboration after the coming of peace and to act according to the principles of mutual respect for their sovereignty and territorial integrity and of non-intervention in the internal affairs of the other Contracting Party. The High Contracting Parties agree to afford one another all possible economic assistance in the postwar period in order to facilitate and expedite the rehabilitation of both countries and to make their contribution to the prosperity of the world." (Sino-Soviet Treaty of Friendship and Alliance, August 14, 1945, Arts. V, VI)

b. ". . . the Government of the Union of Soviet Socialist Republics agrees to render to China moral support and aid in military supplies and other material resources, such support and aid to be entirely given to the National Government as the Central Government of China." (Report of Soviet Foreign Minister Molotov, August 14, 1945)

In its occupation of Manchuria, commencing in 1945, the Soviet authorities removed from Manchuria assets valued at $858,000,000 in the form of mining equipment, rolling stock, steel mills, electric power generators, and other equipment.

The Chinese Government failed to receive from the USSR the promised military supplies and other material resources called for by the treaty. When Soviet troops left Manchuria, they allowed the Chinese communists to take over substantial quantities of Japanese arms and assume control over the area. Chinese Government troops attempting to enter Manchuria subsequent to the Japanese surrender were denied the right to land at Dairen by the Soviet authorities there and were forced to use less advantageous landing points.

c. "The administration of Dairen shall belong to China." Agreement concerning Dairen, August 14, 1945).

Due in large part to Soviet obstructionism, China was unable to establish a government administration at Dairen.

M. Korea

The USSR violated the Cairo Declaration and subsequent Allied agreements on Korea by establishing a Soviet-controlled regime in North Korea, by refusing to cooperate with the Western Allies, and by supporting the North Korean invasion of South Korea in June 1950.

1. Wartime Agreements

The Cairo Declaration, reaffirmed by the Potsdam Protocol, pledged Allied cooperation for establishment of a free and independent Korea.

a. ". . . in due course Korea shall become free and independent." (Cairo Declaration, December 1, 1943, adhered to by the USSR, August 9, 1945)

b. "The terms of the Cairo Declaration shall be carried out . . . ." (Proclamation Defining Terms for Japanese Surrender, Potsdam Protocol, July 26, 1945)

2. Postwar Agreements

A series of postwar Allied agreements based on the Foreign Ministers Declaration of December 1945 sought to establish practical means for rehabilitating Korea on a democratic basis.

"In order to assist the formation of a provisional government and with a view to the preliminary elaboration of the appropriate measures, there shall be established a Joint Commission consisting of representatives of the United States command in southern Korea and the Soviet command in northern Korea. In preparing their proposals the Commission shall consult with the Korean democratic parties and social organizations. . . . It shall be the task of the Joint Commission, with the participation of the provisional Korean democratic organization, to work out measures also for helping and assisting (trusteeship) the political, economic and social progress of the Korean people, the development of democratic self-government and the establishment of the national independence of Korea." (Report of Conference of Foreign Ministers, December 27, 1945)

The Soviet Union from the start thwarted the implementation of this agreement. Its representatives on the Joint Commission refused to recognize as "democratic" any parties and organizations not under Soviet control. The USSR used its occupation of Korea north of the 38th parallel to institute there a pro-Soviet communist regime which claimed jurisdiction over the entire country.

The Joint US-USSR Commission on Korea met 62 times. The first meeting was held on March 20, 1946; the last meeting was held on October 18, 1947. The first series of 24 meetings were concluded on May 8, 1946, when the Joint Commission adjourned *sine die*. The meetings were reconvened on May 21, 1947, and were finally suspended, after 38 meetings, on October 18, 1947.

In these 62 meetings, the Joint Commission failed to resolve the one issue which divided the Soviet and American delegations at the beginning of the talks, namely the issue of what Korean groups should be consulted concerning the formation of a provisional Korean Government. The USSR took the position that only those Korean parties and social organizations which fully supported the provisions of the Moscow agreement on Korea should be consulted. The United States held that this policy would exclude from consultation a large majority of the Korean people and would place a communist minority, which had not openly opposed the Moscow agreement, in a predominant position in the consultations. After Joint Commission negotiations had broken down on this issue in 1946, an exchange of letters between Secretary of State Marshall and Soviet Foreign Minister Molotov in April and May 1947 gave the impression that the USSR was willing to modify its position on the problem of consultation with Korean groups, and the Commission reconvened on May 21, 1947. However, the Soviet delegation in July reverted to the position it had taken during the 1946 talks, and the meetings were finally suspended on October 18.

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[9] The RSFSR (Russian Socialist Federal Soviet Republic) was superseded by the USSR on Dec. 30, 1922.

On June 25, 1950, the pro-Soviet communist regime of North Korea, armed and encouraged by the Soviet Union, attacked the Republic of Korea.

N. Japan

The Soviet Union has violated the Potsdam Protocol b[illegible]e to return all Japanese prisoners h[illegible]., USSR. It has also unilaterally r[illegible]ed promises contained in the Joint [illegible]ation of 1956 which established diplomatic relations between the USSR and Japan.

1. The Prisoner Issue

The Potsdam Protocol stipulated the immediate return of Japanese prisoners of war.

"The Japanese military forces, after being completely disarmed, shall be permitted to return to their homes with the opportunity to lead peaceful and productive lives." (Proclamation Defining Terms for Japanese Surrender, Potsdam Protocol, July 26, 1945, Art. IX.)

On April 22, 1950, TASS announced that the Soviet Government had completed the repatriation of Japanese "prisoners of war" from its territories, except for 2,467 men charged with war crimes or under medical treatment. However, Supreme Commander Allied Powers (SCAP) and Japanese Government figures show that as of that date 369,-382 Japanese prisoners of war and civilians remained under Soviet control, still unrepatriated or unaccounted for.

2. The joint declaration

By the terms of the USSR-Japanese Joint Declaration of 1956, the Soviet Union pledged to refrain from interference in Japan's internal affairs and to return the islands of Habomai and Shikotan to Japan upon conclusion of a peace treaty.

". . . the Union of Soviet Socialist Republics . . . agrees to transfer the islands of Habomai and the island of Shikotan to Japan on the understanding, however, that the actual transfer of these islands to Japan will take place after the conclusion of a peace treaty between the Union of Soviet Socialist Republics and Japan. . . . The USSR and Japan mutually undertake to refrain from interfering, either directly or indirectly, in each other's internal affairs for any reasons of an economic, political or ideological character." (Joint Declaration of the USSR and Japan, October 19, 1956, Arts. III, IX.)

The Soviet Union declared in a note of January 27, 1960, that the Habomai and Shikotan Islands would not be returned to Japan upon conclusion of a peace treaty if Western military forces remained in Japan. This was a clear repudiation of the Joint Agreement, which had placed no such conditions on the return of the islands.

The USSR has repeatedly and flagrantly interfered in Japanese internal affairs. During the weeks preceding the Japanese Diet elections of May 22, 1958, Soviet radio propaganda beamed at Japan violently opposed the re-election of Premier Kishi's Liberal Democratic Party. Soviet threats against the Japanese Government reached a high point during the renegotiation of the United States-Japan Security Treaty, threatening Japan with the danger of a nuclear war if the treaty were signed.

O. The United States

The USSR has frequently violated the terms of the Litvinov Agreements of 1933 and has failed to live up to its side of the wartime lend-lease agreements.

1. The Litvinov Agreements

The Litvinov Agreement stimulated that the USSR would not engage in subversive activities against the United States, that it would inform American authorities immediately of the whereabouts of American citizens held in the Soviet Union, and that it would not refuse visas to American citizens on the grounds of religion.

a. ". . . it will be the fixed policy of the Government of the Union of Soviet Socialist Republics to respect scrupulously the indisputable right of the United States to order its own life within its own jurisdiction in its own way and to refrain from interfering in any manner in the internal affairs of the United States, . . . to refrain, and to restrain all persons . . . from any act tending to incite or encourage armed intervention or any agitation or propaganda having as an aim the violation of the territorial integrity of the United States, its territories or possessions, or the bringing about by force of a change in the political or social order of the whole or any part of the United States . . . not to permit the formation or residence on its territory of any organization or group . . . which has as an aim the overthrow or the preparation for the overthrow of, or the bringing about by force of a change in, the political or social order of the whole or any part of the United States. . . ." (Letter of Soviet Foreign Minister Litvinov to President Roosevelt, November 16, 1933.)

The Soviet Foreign Minister's avowal produced no effect whatever on the activities of the Third International, or Comintern, which continued to carry out its role as the organizer and directing center of the world communist movement from its headquarters in Moscow. On November 21, 1933, five days after his pledge, Litvinov said that the activities of the Comintern would not be affected by the Agreement of November 16. Yet the avowed purpose of the Comintern, clearly defined in its statutes and theses, was "the struggle by all available means, including armed force, for the overthrow of the international bourgeoisie and the creation of an international Soviet Republic."

Although the Comintern was formally dissolved in 1943, Soviet-inspired communist activity in the United States continued unabated. Evidence of systematic violation of the Litvinov agreements after 1945 was brought to light by convictions under the Smith Act of 1940, which made it a criminal offense "to organize or help to organize any society, group or assembly of persons who teach, advocate or encourage the overthrow or destruction of any Government in the United States by force or violence."

The trial and conviction in 1949 in a United States Federal Court in New York of eleven communist leaders revealed that the American Communist Party, acting on orders of the Soviet Union issued by Dmitri Ma[illegible]lisky, Comintern leader and in 1949 Forei[illegible] Minister of the Ukrainian Soviet Socialist Republic, had returned to a policy of violent revolution.

b. ". . . the Government of the Union of Soviet Socialist Republics, while reserving to itself the right of refusing visas to Americans desiring to enter the Union of Soviet Socialist Republics on personal grounds, does not intend to base such refusals on the fact of such persons having ecclesiastical status." (Letter of Soviet Foreign Minister Litvinov to President Roosevelt, November 16, 1933).

In March 1955 the Soviet Government expelled the Reverend Georges Bissonette, one of a succession of clergymen who had resided in Moscow and ministered to the spiritual needs of American nationals of the Roman Catholic faith in Moscow. The Soviet Government refused entry to Father Louis Dion as successor to Father Bissonette on the grounds that the Litvinov-Roosevelt agreement provided for reciprocity in the admission of clergymen to the respective countries. Although the 1933 agreement contained no provision to this effect—of which the Soviet Union's failure to make any such claims in the intervening years was itself tacit admission—the Soviet Government continued to bar Father Dion for nearly four years. He was finally admitted in January 1959 after repeated representations by the United States to the Soviet Government.

2. Lend-lease Agreement

The Lend-Lease Agreement provided for wartime cooperation and exchange of information and stipulated that material shipped to the USSR should be returned upon the ending of hostilities.

a. "The Government of the Union of Soviet Socialist Republics will continue to contribute to the defense of the United States of America and the strengthening thereof and will provide such articles, services, facilities or information as it may be in a position to supply." (Agreement on Mutual Assistance, June 11, 1942, Art. II.)

There was almost complete lack of reciprocity in exchange of information. The frustrations experienced by the United States Military Mission in Moscow in attempting to achieve a semblance of cooperation with the Soviets were portrayed by General John R. Deane, the head of the Mission, in his book, *The Strange Alliance*.

b. "The Government of the Union of Soviet Socialist Republics will return to the United States of America at the end of the present emergency, as determined by the President of the United States of America, such defense articles transferred under this agreement as shall not have been destroyed, lost or consumed . . . ." (Agreement on Mutual Assistance, June 11, 1942, Art. V.)

In the lend-lease settlement negotiations the United States expressed willingness to settle for "fair" value of articles remaining on the basis of usefulness to the Soviet peacetime economy. In January 1951, the United States offered to let the USSR settle its lend-lease account for a payment of $800,000—a small fraction of the value of goods retained by the Soviets. On February 4, 1960, the Soviet Embassy offered to reopen the lend-lease talks on the condition that a settlement be sought as part of a broad agreement on increased trade and long-term credit for the Soviet Union. The United States has insisted, however, that the USSR fulfill the terms of the 1942 agreement by settling its lend-lease account as a prior condition to other economic negotiations.

P. Great Britain

During the interwar period the USSR repeatedly violated pledges not to engage in subversive propaganda. In 1955, the Soviet Union unilaterally repudiated the 1942 Mutual Assistance Agreement.

1. Prewar Agreements

a. "This present Agreement is subject to the fulfillment of the following conditions, namely: (a) that each Party refrains from hostile action or undertakings against the other and from conducting outside of its own borders any official propaganda direct or indirect . . ." (RSFSR-United Kingdom Trade Agreement, March 16, 1921, Preamble.)

On May 8, 1923 Great Britain delivered the "Curzon ultimatum" to the USSR, threatening to terminate the trade agreement unless impounded British fishing vessels were released and the Soviet Union disowned and recalled agents in India, Persia, and Afghanistan engaged in anti-British propaganda.

b. ". . . the Government of the Soviet Union declares that the abstention from interference with the internal affairs of the other country constitutes the necessary condition for mutual confidence and friendly relations between the two countries." (Soviet Note Regarding *De Jure* Recognition and Settlement of Outstanding Questions, February 8, 1924.)

The British Government was forced to protest, on February 23, 1927, Soviet violations of its pledge to abstain from subversive propaganda. Evidence of hostile Soviet activities in Great Britain was published by the British Government in a White Paper and diplomatic relations were severed on May 26, 1927. Diplomatic relations were resumed on November 5, 1929.

2. The Mutual Assistance Pact

The British-Soviet Treaty of 1942 pledged mutual cooperation during the postwar period.

"The High Contracting Parties declare their desire to unite with other like-minded States in adopting proposals for common action to preserve peace and resist aggression in the postwar period." (United Kingdom-USSR Treaty of Alliance and Mutual Assistance, May 26, 1942, Art. III).

This treaty was unilaterally annuled on May 7, 1955 by the USSR. The action was one aspect of a Soviet campaign to prevent the ratification of the Paris agreements, which terminated the occupation of Western Germany and brought the newly formed Federal Republic into the North Atlantic Treaty Organization.

Q. Other agreements

1. The Soviet-French Treaty

On December 10, 1944, the USSR concluded a treaty of alliance and mutual aid which pledged mutual cooperation during the postwar period.

This treaty was unilaterally abrogated by the USSR on May 7, 1955, at the same time that the USSR abrogated its 1942 treaty with Great Britain.

2. The Soviet-Yugoslav Credit Agreement

On January 12, 1956, the Soviet Union and Yugoslavia concluded an agreement under which Yugoslavia was to receive Soviet credits for economic construction and expansion. Additional Soviet credits were offered to Yugoslavia in an agreement concluded August 3, 1956.

In the spring of 1958 the Soviet Union, which had become increasingly disgruntled with Yugoslavia's ideological independence, endeavored to use its credit agreement as a political weapon. *Pravda*, on May 9, 1958, noting that "ideological differences lead to differences on political issues," threatened in a thinly veiled fashion that economic assistance might be terminated if the Yugoslav ideological lines were not changed. On May 27, 1958, Foreign Minister Gromyko handed to the Yugloslav Ambassador a note announcing the unilateral suspension for five years of Soviet deliveries under the 1956 credit agreements.

3. The Israeli Oil Contract

On July 17, 1956, the Soviet state oil-exporting firm, *Soiuznefteksport*, concluded a contract with two Israeli companies to deliver oil to Israel.

On November 6, 1956, the Israeli companies were informed that the Soviet Ministry of Foreign Trade had canceled the export license under which the shipments were to be made. In announcing the unilateral cancellation of the contract, *Soiuznefteksport* justified its action by an interpretation of *force majeure* which was not even consistent with Soviet law. Israeli claims for damages were rejected out of hand by the decision of the Soviet Foreign Trade Arbitration Commission.

4. Freedom of Navigation on the Danube

On December 4, 1946, the USSR agreed at the fourth meeting of the Council of Foreign Ministers that a provision for freedom of navigation on the Danube would be included

in the peace treaties with Rumania, Bulgaria and Hungary.

The USSR and its supporters, the East European satellites, at the Danube Conference in Belgrade (July 30 to August 18, 1948) pushed through virtually unchanged the Soviet draft for a new Danube convention. According to an official United States statement on August 18, the Soviet bloc "brushed aside" every amendment submitted by the Western powers. The United States, the United Kingdom and France refused to sign the Belgrade Convention and declare that they considered previous agreements on the Danube still in force. The USSR which was not a party to the 1921 convention, asserted on the other hand that Western failure to accept the new Soviet-imposed convention "will in no measure influence its coming into force."

Adoption of the Belgrade Convention provided pseudo-legal trappings for already existent Soviet domination over Danube affairs. The convention eliminated all Western countries from a new Danube Commission, which was to have representatives only from the riparian powers (annexation of Bessarabia made the USSR a riparian power). It denied the rights of Western countries under past agreements such as the 1921 convention. The new convention limited the powers of the projected commission by providing for a special Soviet-Rumanian administration on the maritime Danube, thus giving the USSR a strategic position for influencing Danube affairs. The effect of the convention was to perpetuate pro-Soviet discriminatory practices along the river.

INTERPRETING THE ABM TREATY BY PAUL H. NITZE

Following is an address by Ambassador Paul H. Nitze, Special Adviser to the President and the Secretary of State for Arms Control Matters, before the Johns Hopkins University School of Advanced International Studies, Washington, D.C., April 1, 1987.

Central to the arms control portion of today's foreign policy debate is the question of how the limitations in the ABM [Anti-Ballistic Missile] Treaty apply to strategic defense development and testing activities. This debate has focused on two alternative interpretations of treaty obligations, the so-called broad and narrow interpretations. This issue of interpretation arises because the language of the ABM Treaty is ambiguous in its treatment of certain advanced technologies being investigated by both the U.S. SDI [Strategic Defense Initiative] program (including laser, particle beam, and kinetic energy devices and passive sensors) and by the Soviet Union.

When the language of a treaty is ambiguous, compilations on international law say that, in interpreting the treaty, reference can be made to the treaty negotiating record and the record of subsequent practice of the parties pursuant to the treaty. The Senate proceedings leading to the treaty's ratification also bear on this matter.

An Administration analysis of the ABM Treaty negotiating record has been made available to the Senate. On the basis of that analysis, President Reagan concluded that the broad interpretation was fully justified. We continue to support that conclusion.

Six weeks ago, President Reagan directed that comprehensive analyses also be conducted of the other two bodies of evidence that may bear on the proper interpretation of the treaty—the record of subsequent practice of the two parties and the U.S. treaty ratification proceedings. These studies should be completed by April 30. The Administration will consult fully with the Congress on the results of the studies and the implications of all three analyses for the future conduct of the SDI program.

As the debate on ABM Treaty interpretation continues, it is important to make clear the parameters of the issue. I will try to do so and to clarify as well why my recollection of the ABM Treaty negotiations, reinforced by my review of the negotiating record, leads me to believe that the limits posited by the broad interpretation are all that the Soviet negotiators agreed to in a manner binding on themselves.

Nature of the Dispute

Most of the ABM Treaty, as it bears upon the SDI program, is not in dispute. The issue between the broad and the narrow interpretation relates to the fact that, at the time the treaty was negotiated, all ABM systems then deployed or contemplated for deployment were based upon a combination of ABM interceptor missiles, launchers for those missiles, and ABM radars. The broad versus narrow issue concerns only the development and testing of systems based upon physical principles other than those involved in such ABM interceptor missiles, launchers, and radars, and of the components of such systems.

The current debate poses no issue with respect to the deployment either of components or of systems based upon other physical principles; all are agreed that deployment of such components or systems is not permitted without prior consultation and amendment to the treaty. Thus, the basic principle of the treaty—that, without amendment to the treaty, neither side may deploy systems or components except as provided in article III—is not in question. There is also no issue with respect to research; the word "research" is nowhere used in the treaty.

With respect to testing, the issue does not apply to the testing of components of fixed, ground-based ABM systems at an agreed test site or deployment area, regardless of whether an interception occurs in space or in the atmosphere. Article IV permits such testing. The issue also does not apply to testing of systems based on other physical principles that are fixed and land based. The issue concerns only tests of mobile (including space-based) systems based upon other physical principles and their components able to substitute for ABM interceptor missiles, ABM launchers or ABM radars.

Under the narrow interpretation, such tests would not be permitted because that interpretation would require the substitute component to be fixed, land based, and at an agreed test range or deployment area. Under the broader interpretation, they would generally be permitted, even if mobile (including space based).

rovisions of the Treaty

To aid in understanding the interpretation issue, it is useful to have in mind the pertinent provisions of the treaty. The following is a condensation of those provisions; the full text is, of course, available to those who prefer to consult it.

Article I of the treaty prohibits deployment of ABM systems for a territorial defense and providing a base for such a defense. It also prohibits deployment of ABM systems for defense of an individual region except as provided in article III. Article I thus limits deployment, not testing, and limits ABM systems, not ABM components.

Article II defines an ABM system as "a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of": ABM interceptor missiles, which are missiles constructed and deployed for an ABM role or of a type tested in an ABM mode; ABM launchers, which launch ABM interceptor missiles; and ABM radars, which are radars constructed and deployed for an ABM role or of a type tested in an ABM mode. These are the components essential to all ABM systems being deployed or developed in 1972.

Article III states that no ABM systems or components may be deployed other than those ABM missiles, launchers, and radars it specifically allows. The article then specifies the areas in which ABM systems or their components may be deployed and the number that may be deployed in those areas.

Article IV exempts from the limitations of article III ABM systems or their components used for development or testing and located within agreed test ranges.

Article V prohibits the development, testing, and deployment of sea-based, air-based, space-based, and mobile land-based ABM systems and ABM components.

Article VI, paragraph (a), prohibits giving non-ABM missiles, launchers, or radars an ABM capability or testing them in an ABM mode.

Agreed Statement D, to preclude any ABM system deployment except as explicitly permitted by article III, provides that if ABM systems based on physical principles other than those used for ABM components in 1972—including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars—are created in the future, specific limitations on those systems and components would be subject to discussion in accordance with article XIII and agreement in accordance with article XIV.

The interpretation dispute centers on the question of which of these provisions apply to mobile systems based on other physical principles, including mobile components capable of substituting for ABM components.

The narrow interpretation maintains that article V applies to all mobile ABM systems and components, even if they are not components as defined in article II and regardless of the physical principle involved. Mobile systems based on other physical principles and their components capable of substituting for conventional ABM components thus would be captured by the article V ban on testing and development.

The broad interpretation is that Agreed Statement D is the only part of the treaty dealing with systems based on other physical principles and their components and that Agreed Statement D allows both parties to create—i.e., to develop and test to the point of "creation"—such systems and components but not to deploy them.

I remain convinced that though the U.S. negotiators, including me, attempted to achieve a ban on the development and testing of space-based and other mobile devices capable of substituting for ABM components, we failed to do so with the degree of certainty that is necessary for important international agreements. All we achieved, in a form the Soviets would consider binding on themselves, was a ban on deployment, not on the creation of such systems and components.

The Negotiating Record

The negotiating record of the ABM Treaty is classified, like that of other treaties. Therefore, I cannot cite it specifically in these remarks. Instead, I will describe my own recollection of the course of the treaty negotiations, in which I was intimately involved, as refreshed by my recent review of the record.

The United States unquestionably sought to regulate comprehensively not only the three components defined in article II—that is, ABM interceptor missiles, ABM launchers, and ABM radars—but all devices that could substitute for those components. In the provision that ultimately became article V, we sought to prohibit the development, testing, and deployment of space-based or other mobile ABM missiles, ABM launchers, ABM radars, and other devices to perform the functions of these components.

The Soviet draft treaty also contained an absolute ban on development, testing, or deployment in space, but the Soviets explicitly limited its application to missiles, launchers, and radars, and they repeatedly opposed having the treaty cover devices other than those components. They pointed out that it was impossible to know what the components of a system based on a technology not then employed would look like, how they could be defined, and how they should be regulated.

After considerable back-and-forth on this issue, the Soviets proposed a change in article V and assured the U.S. negotiators that the new language would apply to any type of future component. We agreed to this change.

The Soviet assurance appeared to achieve part of the U.S. objective, in that it included coverage of future ABM missiles, launchers, or radars. But the change we accepted in this provision resulted in the deletion, at Soviet insistence, of the U.S. language expressly covering substitute devices for such components.

At the same time, the Soviets had on the table a draft of article II that defined an ABM system as one that consisted of the three conventional components—i.e., ABM interceptor missiles, ABM launchers, and ABM radars. Furthermore, the Soviets continued to argue, with respect to the U.S. effort to regulate substitute "devices," that they opposed in principle attempts to regulate the unknown.

Although this argument was repeatedly made and remained a central issue in the negotiations, we U.S. negotiators did not seek to confirm that the Soviets had, in fact, agreed to regulate unknown devices in article V. Had we done so, it would have been entirely consistent with the Soviet position for them to have reminded us that the language concerning "devices" had been deleted from article V and to have stated that they had agreed to regulate only future "components," which they had defined in their draft of article II to consist of ABM missiles, launchers, and radars. Indeed, given the subsequent events, any other outcome seems implausible.

As the negotiations continued, the Soviets accepted a U.S.-proposed compromise on article II that added the phrase "currently consisting of" in front of the list of ABM components. It has been argued that this revision of article II could be considered to have expanded the Soviet commitment in article V to encompass substitute devices. This claim is contradicted, however, by the fact that the Soviets accepted the revision only after we explicitly assured them that the coverage of substitute devices would be settled elsewhere than in article II.

After article II was negotiated, the Soviets still continued to oppose attempts to regulate substitute devices. They suggested that if systems or components based on other physical principles were created in the future, we should discuss the matter in the Standing Consultative Commission to be created under article XIII. We asked them what would happen if it were impossible to achieve agreement. They suggested either side could then withdraw from the treaty. I, among others, said I believed that would be too extreme a remedy. This led to Agreed Statement D, in which the Soviets agreed, in effect, that after such devices were "created," their deployment would be permitted, if at all, only after discussions and agreement.

Some proponents of the narrow interpretation recall that a Soviet negotiator made an oral statement in January 1972 to the effect that Agreed Statement D specifically permitted the sides to develop and test—but not to deploy—stationary futuristic systems. Assuming such an oral statement was made, it would confirm that Agreed Statement D does, indeed, contemplate the "creation" of components based on other physical principles and that "creation" was recognized to include development and testing. But would such an unrecorded oral statement be considered by the Soviets to be binding on them to the extent of barring them from creating nonstationary components, a point the statement did not address?

The Soviets did agree at one point to one aspect of the American position concerning future, substitute components. But their agreement followed the reading by the U.S. side of a carefully prepared position paper that proposed only that the parties agree to ban the deployment, not the development or testing, of such future substitute systems or components. Furthermore, nowhere did the paper mention a distinction between fixed, land-based substitutes and substitutes based in space or elsewhere. Nor does Agreed Statement D reflect such a distinction.

In the absence of a definition of what would distinguish a "component" of a system based upon other physical principles from an "element," or noncomponent, of such a system, a limitation on development or testing of components would be difficult, if not impossible, to apply in a rigorous, consistent, and verifiable manner. This is a problem we are beginning to face today.

Soviet scientists tell us they are planning a space probe which will have on board both a laser of some power and a particle beam device. They propose to test these devices against one of the moons of Mars, called Phoebus. They say the purpose of the test is to knock pieces off the moon's surface and thereby determine the characteristics of that surface.

It would be difficult to prove that the power, brightness, and tracking and aiming characteristics of these devices are such as to demonstrate that the devices have the capability to substitute for ABM components. A similar problem arises with mirrors capable of reflecting and focusing laser or other directed energy beams. Under what conditions would such a mirror satisfy the definition of being "capable of substituting for" an ABM interceptor, ABM launcher, or ABM radar?

The treaty language is of little help in answering such questions. Agreed Statement D does not define components capable of substituting for ABM interceptor missiles, launchers, or radars. It states only that if such components, or systems based on them, are created in the future, they be subject to discussion in the Standing Consultative Commission and be deployed only after appropriate amendment to the treaty.

In the case of non-ABM missiles, launchers, and radars, article VI(a) provides that they not be given capabilities to counter strategic ballistic missiles or their elements in flight trajectory and that they not be tested in an ABM mode. This article, of course, does not apply to devices which are not missiles, launchers, or radars.

In sum, my recollection of the negotiating process leaves me convinced that the Soviets agreed in a binding manner to prohibit only the deployment, not the creation (i.e., the development and testing), of systems based on other physical principles and their components capable of substituting for conventional components as defined in article II, regardless of basing mode.

Soviet Interpretation of the Treaty

While arguing against the broad interpretation of the ABM Treaty, Soviet officials also place great emphasis on article I of the treaty and what they claim are that article's implications for SDI.

The Soviets note that article I prohibits both deploying ABM systems to defend a country's territory and providing a base for such a defense. They claim that SDI, particularly as it relates to space-based ABM systems, is providing a base for a national territorial defense and that, therefore, SDI violates article I.

This argument is contradicted by views previously expressed by the Soviet side. In a major statement before the Soviet Presidium in 1972, shortly after the ABM Treaty was signed, then-Soviet Defense Minister Grechko stated that the treaty "places no limitations on the performance of research and experimental work aimed at resolving the problem of defending the country from nuclear missile strike." Grechko's view thus explicitly contemplates that the sides are free to conduct a strategic defense program like that being done by SDI and by the similar Soviet program.

Grechko's statement is not, however, an unambiguous rejection of the narrow interpretation. My conclusion that the Soviets were unwilling to agree to the narrow interpretation is based on our lack of success in securing Soviet acceptance during the negotiations of language which would have made that interpretation clear.

Conclusion

In October 1985, when the executive branch announced the results of its review of the negotiating record, we stated as well that although we considered the broad interpretation to be fully justified, we would continue, as a matter of policy, to carry out the SDI program as originally structured, which is consistent with the narrow interpretation. The program remains so structured today.

It is also true, however, that progress in the SDI program has been such that the cost of remaining within the narrow interpretation, in terms of time and expense, is rising. The managers of the program would like to conduct it as efficiently as possible, within our treaty obligations.

We recognize, though, that all three of the pertinent bodies of evidence must be weighed. That is the process on which we are embarked.

As I stated earlier, after our analyses of the record of subsequent practice and of the ratification proceedings are completed, we will share them with the Congress, as we have our analysis of the negotiating record. We will then begin a series of consultations designed to reach a fuller understanding of the treaty interpretation question and to establish guidelines for SDI development and testing activities that will continue to merit congressional, allied, and public support. ■

JOINT LETTER FROM NEGOTIATORS OF ABM TREATY

As negotiators of the 1972 ABM Treaty with the Soviet Union, we reaffirm our support for the Treaty on the fourteenth anniversary of its signing. We concur with the view of six former Secretaries of Defense that this international agreement of unlimited duration makes an important contribution to American security and to reducing the risk of nuclear war.

We wish to confirm our view that the Treaty prohibits the development and testing, as well as deployment, of all space-based and other mobile-based ABM systems and components, regardless of whether they use 1972-era or newer technologies. This view of the Treaty is clear from the ordinary meaning of the Treaty text, the Treaty's negotiating record, the United States legislative history, and the subsequent practice of both the US and the Soviet Union. We believe that a careful reading of the classified negotiating record will support our position.

We are convinced that the Soviet negotiators shared our view that the Treaty bans the development, testing, and deployment of all space-based ABM systems and components. For fourteen years, Soviet statements and actions have been consistent with this view, and Ambassador Paul Nitze has testified that the Soviets have not violated the Treaty's clear ban on developing space-based exotic ABMs.

The Treaty's text unmistakably bans the development and testing, as well as deployment, of all space-based strategic defenses. Article V does so in unequivocal language that allows no exceptions. Agreed Statement D was intended to prevent fixed land-based ABM weapons using new technologies from being deployed in a way that could lead to a nation-wide ABM system. It further restricts the Article III exception to the general ban on nationwide ABM systems, an exception which permits a limited, single site, fixed land-based ABM system. To interpret Statement D in a way that would eviscerate Article V's ban on space-based ABMs, as some have suggested, would be tantamount to withdrawing from the Treaty. The language of Article II clearly indicates that the listing of 1972-era ABM components is illustrative, not definitive. Hence, Article II does not limit Article V's ban on ABM development, testing, and deployment to those ABM technologies known in 1972.

We believe that the Treaty's clear ban on the development and testing of all space-based ABM systems and components is crucial to its viability as a valuable agreement that promotes American security and could lead to progress in limiting US and Soviet strategic weapons. We commend President Reagan for abiding by this traditional view of the Treaty and urge him to continue to do so.

Gerard C. Smith
Royal B. Allison
Harold Brown
Philip J. Farley
Raymond L. Garthoff
J. Graham Parsons
John B. Rhinelander
Lawrence D. Weiler

March 10, 1987

MEMBERS OF US-SALT I DELEGATION AFFIRMING ESTABLISHED INTERPRETATION OF ABM TREATY

	Postion on SALT I Delegation:
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SOVIET COMPLIANCE WITH ARMS AGREEMENTS: THE POSITIVE RECORD

Arms limitation treaties are not based on mutual trust, but on self-interest. The Soviet Union entered the SALT I and II treaties because it believed that they would contribute to its security. It accepted the restraints imposed by the treaties as the cost of insuring that the United States would observe similar restraints. The United States made the same judgment and accepted the same tacit bargain. Compliance is not a matter of good will but of practical self-interest.

The Reagan Administration alleges that the Soviet Union has systematically violated the treaties. Such charges run in the face of clear and consistent evidence that the Soviet Union has been careful to observe all the principal requirements of the SALT I and II treaties. It has done so, moreover, at the cost of dismantling or retiring far greater numbers of strategic weapons to stay in compliance than has the United States.

The Administration's action is prompted by its long-standing ideological biases and political purposes, as well as by legitimate concerns about Soviet treaty compliance. Administration spokesmen made clear from the beginning that they were determined to do away with what candidate Reagan called the "fatally flawed" SALT II treaty. The Administration has been equally determined to make big increases in military spending as a means both of restoring what it claimed was an "eroded" security position and of forcing the Soviet Union to the bargaining table on U.S. terms.

Unfortunately, the Administration's campaign has had the effect of misinforming the American people about the complexities of the nuclear relationship and the role that arms talks have played in moderating and controlling the U.S.-Soviet nuclear weapon competition. This *Defense Monitor* clarifies the record.

Words and Deeds

"Let them back up their words with deeds . . ." is a challenge that the President and other Administration spokesmen have frequently used to suggest that when it comes to arms limitation the Soviet Union is all talk, no action. Apparently they haven't been watching very closely, because in fact the Soviet Union has put its missiles where its mouth is. It has methodically deactivated strategic nuclear weapon systems to meet the limitations on launchers and various categories of weapons imposed by the SALT I and II treaties, and it has done so in far greater numbers than the U.S. has done.

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DEACTIVATIONS OF STRATEGIC WEAPONS UNDER SALT (1972-86)

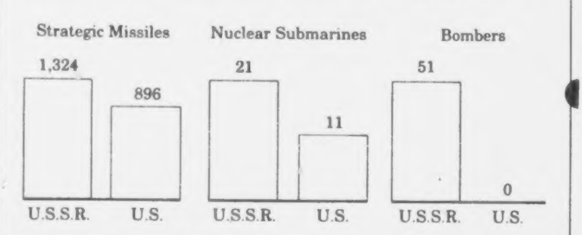

Chart prepared by Center for Defense Information.

Between the entry into force of SALT I on October 3, 1972 and President Reagan's announcement on May 27, 1986 that the United States was no longer bound by the agreements, the Soviet Union has withdrawn or dismantled 1,324 strategic nuclear missiles to stay in compliance. The corresponding U.S. total is 896. The Soviet Union has also withdrawn or dismantled 21 nuclear-missile carrying submarines, 14 of them modern, comparable to the U.S. Polaris. The U.S., by comparison, dismantled 11. As for bombers, the number of Soviet deactivations is in dispute, with the Soviets claiming 51, and the U.S. conceding only 15. The United States itself has not deactivated any bombers.

This record of Soviet compliance with the numerical ceilings of the SALT agreements is hard to reconcile with the Administration's charges of systematic and widespread non-compliance by the Soviet Union. Why would the Soviet Union cheat for relatively insignificant military advantages, as the Administration charges, when at the same time it is adhering to the major provisions of the treaties that require militarily significant restraint and substantial economic costs? The Administration offers no explanation for this imputed inconsistent behavior because it studiously avoids acknowledging that the Soviet Union has indeed been observing the SALT ceilings.

Deactivations

Administration spokesmen attempt to minimize the significance of Soviet deactivations by saying that they represent merely the replacement of older weapons by newer ones. In fact, the Soviet deactivations cannot be dismissed lightly. Senators Dale Bumpers and Patrick Leahy pointed out in 1984 that the Soviets had dismantled 10 submarines during the preceding six years that were newer than all but four of the U. S. submarine fleet.

Moreover, to fully gauge the cost to the Soviets of these deactivations, it is important to be aware of the traditional Soviet practice of keeping military equipment in inventory long beyond normal life spans as measured by foreign practice. For example, the Soviet SS-4 medium range missile, not limited by SALT, is still operational today, even though it was first deployed in 1958. This liquid-fueled missile is so obsolete it uses external fins for guidance. And when the Soviets began to deploy their SS-11s and SS-9s in the mid-1960s, they didn't displace their older SS-7s and SS-8s until they were forced to withdraw them to offset new submarine launched missiles under SALT.

As Admiral William Crowe, chairman of the Joint Chiefs of Staff, said in recent testimony before a Senate subcommittee, "The Russians don't throw their old stuff away like we do." It is safe to assume that for officers raised in the Soviet military tradition, the cutting up of Yankee class submarines or the blowing of SS-11 silo covers are not simply the cost-free and pain-free exercises that Pentagon analysts sometimes represent them to be.

Soviet Concessions and Compromises

Another well nourished myth about SALT is that the Soviets played a largely passive and non-cooperative role in the negotiations, playing on U.S. impatience to gain concessions. Considering the largely confrontational nature of U.S.-Soviet diplomatic relations in the post-World War II era, the Soviets' reputation for hard bargaining is well deserved. Nevertheless, it is not true that the Soviets sat back in SALT and let the U.S. do all the work in seeking compromises.

One instance of Soviet compromise concerned American forward based systems (FBS) in Europe—that is, the nuclear-capable aircraft and missiles based in the European area. The Soviets consider these systems to be strategic since they are capable of attacking the Soviet homeland. Americans hold that they are "theater weapons," since they are relatively limited in range. The Soviets eventually decided not to press the issue in SALT negotiations and in the subsequent intermediate-range nuclear forces (INF) negotiations that took place in the 1980s. They also agreed not to count the French and British nuclear forces in both negotiations.

Another Soviet concession concerned the agreement in 1977 not to produce, test, or deploy the SS-16 missile, a three-stage, solid fueled ICBM, the first two stages of which were identical to the two-stage SS-20 intermediate-range missile. The Soviets agreed to a ban on the SS-16 to allay U.S. concerns that the SS-20s based in the western U.S.S.R. could be quickly converted to intercontinental-range SS-16s.

Still another concession was U.S.S.R. acceptance of a U.S. proposal for developing and maintaining an "agreed data base" as a means for monitoring SALT compliance. In agreeing to this proposal, the Soviet ambassador emphasized the significance of the concession in the light of the Russian tradition of secrecy. "You have just repealed four hundred years of Russian history," he said, adding, "Maybe that's not a bad idea."

Indeed, the Soviet Union's acceptance of the SALT requirement to expose its strategic forces, and thereby indirectly its entire society, to unlimited U.S. observation by satellites was a truly revolutionary departure from the historic Russian obsession with secrecy. Moreover, it was more than an even trade-off because the U.S. stood to gain much more from this mutual surrender of secrecy than did the Soviet Union. The Soviet Union already had access to much of the information it needed to monitor U.S. weapon programs from open sources.

Soviet Commitment to Arms Talks

The Soviet interest in nuclear arms limitation is rooted in military, political, and economic realities. The existence of the SALT agreements enhances the predictability of the nuclear arms relationship and hence helps Soviet military and national leaders to make long-term plans. It helps to avert an unlimited arms competition with the United States which, given our technological advantages, would be a devastating setback to Soviet plans for domestic economic expansion. It reduces the danger of nuclear war by keeping open channels of diplomatic communication with the United States.

The Soviet leaders do not blow hot and cold on arms talks as American presidents have been known to do. They committed themselves to the goal of seeking arms agreements with the United States in a formal and public way at the beginning of the SALT negotiations and they have reaffirmed that commitment repeatedly. Arms control has been declared a goal of Soviet policy in each of the four Communist party congresses that have been held since 1971, a record of continuous commitment that has great political significance in the Soviet Union. All the individual Party leaders during that period—Brezhnev, Andropov, Chernenko, Gorbachev—spoke frequently and eloquently on behalf of the policy. And all of them have taken care to get public endorsement from the Politburo, the highest Party executive organ, for all the actions they have taken in negotiating with American leaders.

These public commitments are much more important as indices of government policy than is often appreciated in America. We tend to dismiss all Soviet statements as propaganda, but the formal statements of a Party leader on major issues of policy have significant binding force.

In identifying himself with a certain policy a Soviet leader puts his own credibility and the credibility of the Party on the line. It is not a risk that is taken lightly. Khrushchev threw a tantrum at the aborted Paris summit meeting in 1960 because he felt that his policy of peaceful coexistence had been mocked by the U-2 spy plane. Andropov carried out his threat to walk out of the Geneva arms talks as soon as American missiles began to appear in Europe in 1983, even though the action had lost its point as far as American policy was concerned and was, moreover, damaging to the Soviet image abroad.

Soviet military doctrine is not inconsistent with a genuine commitment to nuclear arms limitation. Soviet military writings do deal with waging war under nuclear conditions, but this does not mean that Soviet military and political leaders believe that a nuclear war can be "won" in any meaningful sense. A Soviet publication in 1981, responding to the Pentagon's first report on "Soviet Military Power" conceded that Soviet military doctrine accepted the "winnability" of nuclear war in the 1960s, but declared that it no longer did so. Such a declaration could not be made unless Soviet authorities were prepared to live with it as a valid expression of Soviet official views.

Major Charges

A contrasting picture of the Soviet Union is presented in a series of reports published by the Reagan Administration since 1984 accusing the Soviets of systematically cheating on arms agreements. The specific charges differ greatly in degree of gravity and in the certainty with which the accusations are made. Many of them are couched in highly tentative language, and are surrounded with such qualifying adjectives and phrases as: "the evidence . . . is ambiguous," "the evidence . . . is insufficient to fully assess," "the U.S.S.R.'s actions . . . constitute an ambiguous situation," "there are ambiguities concerning the data," and so on.

Moreover, they virtually all represent "worst case" analyses of evidence that is always difficult to assess. A "worst case" analysis places the most alarmist interpretation on a set of data. As Secretary of Defense Caspar Weinberger said in 1983, "Compliance issues are always very difficult, in part because existing agreements often contain vague or equivocal language of which there can be, in the nature of the case, no authoritative interpretation."

The United States has reason to be concerned over some Soviet SALT related activities and should pursue them with the Soviet Union to a satisfactory solution. The new Soviet radar under construction near Krasnoyarsk, the new Soviet SS-25 ICBM, and the Soviet use of encryption to conceal missile test telemetry are among the issues that warrant serious investigation and discussion with the Soviets.

The **Krasnoyarsk radar** is a large phased-array radar of a type associated with early warning functions which also has some inherent ABM capabilities. The radar's purpose cannot be determined conclusively because it is not yet operational. The Administration believes that it is an early warning radar because it closely resembles other Soviet radars of this type. If so, it would be in violation of the ABM treaty which provides that such radars must be located on the periphery of the national territory and facing outward. The Administration also argues that the Soviets intend to use the radar in a future nationwide ABM system, which, of course, would violate the ABM treaty even more flagrantly.

The Soviets contend that the radar is intended to perform space tracking functions which is allowed by the ABM treaty. Space tracking would involve monitoring its own and other countries' satellites as well as the great amount of space debris that has accumulated since the 1950s. The signals emitted by the radar when it is turned on will help to resolve the issue because the power required for space tracking is much less than that required for ABM functions. In the meantime, the Soviets reportedly offered to halt construction on the radar if the U.S. would do the same on two early warning phased-array radars that it is installing in Greenland and the U.K. Whether the U.S. explored the offer is not known, but it seems clear that the Administration's high voltage publicity on the issue is not calculated to encourage the Soviets to push their offer further.

New Missile

The **SS-25** is a solid-fueled, single warhead ICBM, capable of mobile deployment, that was first tested in 1983. The Administration charges that it is a violation of SALT II on two counts. First, it is alleged to be a second new ICBM, the one new one allowed by the treaty, the SS-24, having already been designated by the Soviet Union as its authorized missile. Second, even if it is a permitted modification of the SS-13 as the Soviets claim, it is said to violate certain technical parameters established by the treaty to inhibit the addition of warheads to single warhead ICBMs.

The Soviets deny both charges, claiming that they are based on faulty data. In fact, the U.S. data on the SS-13 were derived from tests some 20 years ago and are less detailed than those that can be collected today. In addition, say the Soviets, the U.S. has not made proper allowances for the fact that the SS-25 nose cone included an instrumentation package, whereas the SS-13's targeting mechanism is carried in the third stage rather than the nose cone as with other missiles. As a result the SS-25's throw weight appears higher and the SS-13's lower than they are in fact. To support their contentions, the Soviets fired two SS-13s in 1985 to give the United States the opportunity to recalculate the missile's characteristics. The United States has never publicly acknowledged these demonstration firings, something it might be expected to have done if the data confirmed the Administration's charges. *Newsweek* reported that the CIA found that the new data supported the Soviet case, but that the Pentagon remained unpersuaded.

The Soviets fought hard in the SALT negotiations to avoid restrictions that would have prevented them from deploying the SS-25. Assistant Secretary of Defense Richard Perle has deplored this type of negotiating practice, saying that it amounts to designing loopholes in the treaty. It could be argued with equal merit that the Soviets' refusal to accept language that they knew they could not honor demonstrates their respect for the treaty.

As for what this issue tells us about the Soviet compliance record, a key point is that the Soviets have been dismantling an SS-11 for each SS-25 they deploy. Thus they are deploying one single warhead missile for another, and destroying the latter's costly launcher. It is difficult to see how the modest increase in military capability they stand to gain from such an exchange would justify jeopardizing SALT.

Telemetry encryption refers to the practice of denying electronic information transmitted by missiles in test flight to monitoring stations of the other side. Both sides intercept the telemetry of the other's test flights as a means of verifying missile characteristics, such as launch weight, throw weight, number of stages, and so on. The United States argued for restrictions on telemetry encryption in the SALT II negotiations on the grounds that this was required by the SALT I undertaking "not to use deliberate concealment measures which impede verification." The Soviets resisted any limitation on their right to protect military secrets as best they saw fit.

OFFICIALS SAY SOVIET COMPLIANCE SATISFACTORY

"If you take the body of the treaties in a macrosense, they [the Soviets] have complied with the large majority of the treaties."

Lt. Gen. John T. Chain, Jr.
Director, Bureau of Political-Military Affairs
Department of State
February 20, 1985

"In each case raised by the United States, the Soviet activity in question has either ceased or additional information has allayed U. S. concern."

Arms Control and Disarmament Agency
1982

Eventually the Soviets proposed and the United States accepted a formula which stated that information essential to verifying the treaty should not be encrypted, but left it to the encrypting side to decide what kinds of information this would be.

That the Soviets have used encryption increasingly in recent years seems to be agreed between the Administration and its critics. The issue is whether this practice is a blatant violation of the treaty or simply a case of the Soviets making use of ambiguous treaty language. When the Administration finally raised this issue in the diplomatic forum set up to deal with compliance complaints, the Standing Consultative Commission (SCC) in 1983, it was told by the Soviets that they would modify their practices if the U.S. would specify what types of telemetry information it needed to verify treaty compliance.

With Catch-22 logic, the U.S. has declined to specify what is needed on the grounds that to do so would reveal too much of its intercept capabilities. Since the Soviets already have detailed knowledge of U.S. electronic surveillance capabilities, it appears that the U.S. position is more likely to prevent than to promote a resolution of the problem.

Some Minor Charges

In addition to these substantive cases, the Administration's list of compliance violations includes many issues of a more problematic character. Two of the Administration's favorites concern underground nuclear testing and the overall ceilings on nuclear delivery vehicles set by the no-undercut-of-SALT II commitments.

The **nuclear testing** issue concerns Administration charges that the Soviet Union has violated both the 1963 Limited Test Ban treaty (LTBT) and the 1974 Threshold Test Ban treaty (TTBT) in its underground testing. Charges under the first count concern the alleged venting of nuclear materials into the atmosphere. Charges under the second concern tests which allegedly have exceeded the 150 kiloton limit provided by the treaty.

As for venting, both sides agreed that occasional unintended venting once or twice a year would not be considered a violation of the treaties, and this agreement was made a part of the public record of the TTBT. The Administration does not mention this understanding, nor the fact that the U.S. has also been guilty of occasional accidental ventings.

As for violations of the 150 kiloton limit, the accuracy of the U.S. charges has been called into question by many eminent seismologists. For example, Dr. Roger Batzel, Director of the Lawrence Livermore National Laboratory, said in 1985 that the Soviets appear to observe a yield limit and that "Our best estimate of this yield limit is consistent with TTB treaty compliance." Professor Charles Archambeau, a seismologist at the University of Colorado, expressed the scientific community's opposition more bluntly saying, "No rational scientist would draw the conclusions that the present administration is drawing. It's fairly evident that there is a lot of politics involved in this."

Over strong objections from the Department of Defense, the CIA in 1986 accepted a new methodology for estimating yields of Soviet nuclear tests, belatedly acknowledging the different geological structures of U.S. and Soviet testing sites. This lowered the estimate of Soviet test yields by an average of 20 percent, in effect wiping out the statistical basis for many of the U.S. charges.

As the basis for the U.S. charges has eroded, Administration spokesmen have tended to shift their position from complaining about Soviet violations to insisting that the U.S. must continue to explode nuclear weapons to maintain the reliability of its nuclear arsenal. For example, Richard Perle, in a television interview in San Francisco on May 9, 1986, dismissed the seismologists' views on the grounds that they were simply trying to advance their own professional interests. When reminded that a Defense Department panel of experts also agreed with the seismologists, Perle responded that he didn't particularly care what their opinion was. "It doesn't have any profound bearing on our policy," he said. Both he and other Administration spokesmen have made it clear that the United States intends to continue testing, regardless of the adequacy of verification measures.

Ceilings

The issue concerning **overall ceilings** on nuclear delivery vehicles arises from an Administration charge that the Soviet Union has exceeded its cap of 2504 total vehicles—the number existing when the SALT II treaty was signed. The Administration claims that the Soviet Union violated this cap in 1985 by allowing its total to rise to 2540, or 36 over the cap. But this claim was immediately thrown in doubt by the Joint Chiefs of Staff posture statement for 1987, which showed that the Soviet total was 2477 as of January 1, 1986. Press accounts made clear that the bulk of the discrepancy was accounted for by 30 old Soviet bombers, which the Soviets claim they have converted to tankers.

The U.S. refuses to accept the claim, on the grounds that dismantlement procedures have never been established. At the same time, the reports indicate that the U.S. refuses to discuss dismantlement procedures in the SCC, because to do so would lend legitimacy to SALT, which the U.S. holds is no longer valid. It is hard to escape the conclusion that the Reagan Administration is playing a numbers game on this issue, apparently for no other reason than to extend the list of charges against the Soviet Union.

Stretching the Facts

As the preceding discussion illustrates, compliance issues are often judgmental in character. Those disposed to expect the worst of the Soviet Union can usually find evidence to support their suspicions; those who take a less alarmist view of Soviet intentions can likewise offer less disturbing interpretations of the same evidence. The biases and political purposes of the Reagan Administration are thus legitimate considerations to bear in mind in assessing the charges of Soviet non-compliance.

The Reagan Administration practices a demonology that attributes a large part of the blame for various kinds of trouble in the world to Soviet mischief. Besides reflecting Ronald Reagan's deep-seated ideological biases, this view of the world pro-

U.S. PREOCCUPIED WITH SOVIET CHEATING

"We are enormously preoccupied with our ability to catch them cheating. I think they are, with at least as much emotion, preoccupied with our not forever going around the world calling them liars and cheats. Most people do not enjoy that and do not respond well to it. Certainly most governments do not respond well to it. I think it is much overdone."

Robert W. Buchheim
Former U. S. Commissioner to the Standing Consultative Commission
September 25, 1979

vides broad support for the Administration's foreign policy and military buildup by stressing the omnipresence of a Soviet threat. As Assistant Secretary of Defense Richard Perle explained it, "Democracies will not sacrifice to protect their security in the absence of a sense of danger. And every time we create the impression that we and the Soviets are cooperating and moderating the competition, we diminish that sense of apprehension."

The Administration has kept up a drumbeat of agitation on the compliance issue which has vastly inflated the formal charges. The Administration's main spokesmen on defense and arms control matters, Secretary of Defense Weinberger, Assistant Secretary Perle, and Arms Control and Disarmament Agency chief Kenneth Adelman, routinely represent the alleged Soviet violations as constituting a broad, persistent, and deliberate policy of deception. Weinberger first described the Soviet violations as a "policy" in his 1985 letter to the President on the eve of the Geneva summit recommending "proportionate" responses to Soviet actions. Perle describes alleged Soviet violations as a "strategy of erosion." Adelman uses the phrase "systematic non-compliance."

Distorted Evidence

In addition to overstating their case against the Soviet Union, Administration spokesmen have stretched and distorted evidence. For example, in the above-mentioned letter, Weinberger said that the Soviets would be required to dismantle only 558 strategic weapons as compared to 1320-2240 for the U.S. under the dismantling requirements of SALT II. In fact, the argument disingenuously used *missile* numbers to calculate the Soviet requirements while using *warhead* numbers to calculate the U.S. total. The true comparison, if warhead numbers had been used in both cases, would have been 2350 for the Soviets as against 1320-2240 for the U.S.

Other examples of stretching the evidence include a statement by Mr. Perle that the Soviets vented radioactive materials into the atmosphere "about 40 or 50 times a year." In fact, the U.S.S.R. has never exploded more than 31 nuclear devices underground in any one year. Still another example occurred when Mr. Adelman attempted to discredit the contention that the Soviet Union has dismantled or withdrawn over 1000 strategic missiles by asserting that the Soviets themselves claim only 540. He was clearly referring to a statement made a few days earlier by General Akhromeyev, Chief of the Soviet General Staff. But as Adelman must surely have known, Akhromeyev was referring only to the dismantlements required by SALT II, not the withdrawals of older missiles to make room for newer ones required by the launcher limitations of SALT I.

U.S. Violations

The Administration has given little public notice to Soviet complaints of alleged U.S. violations, except to dismiss them as propaganda gestures. In fact, some of the Soviet complaints have substance and some of the American actions they condemn do correspond closely to the Soviet actions that the U.S. has denounced. Compliance is a two way street. Neither country is immune to the temptation to hedge its commitments a bit, to take out insurance against the possibility that the other side may gain an edge.

This compulsion explains the efforts made by both sides during the negotiation of SALT I and II to keep open options that each felt would give it an advantage. During SALT negotiations, for example, the United States was mainly responsible for keeping the door open for multiple warheads (MIRVs) a development that has turned out to be the most unsettling element in the nuclear arms relationship. The Soviet Union, on the other hand, was mainly responsible for insisting on a very liberal formulation of the encryption issue, which essentially leaves it to each side to determine whether its encryption practices are interfering with the other's right to information required to verify compliance with treaty restrictions.

As for commitments already undertaken under the treaties, the Administration is rapidly moving toward a violation of the ABM treaty with its Strategic Defense Initiative (SDI). It has gone so far as to announce a new interpretation of the ABM treaty based on a provision in the text that says that the treaty could be reopened to consider ABMs based on "other physical principles," i.e., on technology that might be invented in the future. Although it has refrained from adopting the new interpretation thus far, it claims the right to do so unilaterally.

Another issue on which the Administration has been criticized with respect to the compliance issue concerns the early warning radars being built at Thule, Greenland and Fylingdales Moor, England. The Soviets claim that they are subject to the same criticisms that the U.S. has lodged against the Soviet Union for the radar near Krasnoyarsk, namely that they are not located on the national periphery. The U.S. claims that the radars in question are merely improvements of existing systems which were grandfathered by the ABM treaty. In fact, the new radars are far more advanced than their predecessors, being new phased array radars which scan the skies electronically, whereas the older ones were mechanically driven.

The Soviets also contend that U.S. intermediate-range missiles in Europe constitute a violation of the SALT prohibition against "circumventing" the limitations of the treaty through the use of third parties. From the Soviet point of view, these missiles are every bit as deadly as the intercontinental missiles based in the United States or on submarines. There may be valid reasons for refusing to honor the Soviet complaints, but one cannot fairly say that the Soviet argument lacks merit.

Standing Consultative Commission

There is no issue on which the attitude of the Reagan Administration clashes more sharply with that of its predecessors than on the value of the Standing Consultative Commission (SCC). Set up in 1972 as an integral part of the SALT structure, the SCC was intended to serve as a mechanism to resolve issues that might arise in implementing the treaties. During the 1970s, the SCC dealt with and successfully resolved a number of compliance issues raised by the United States. It also maintains an agreed data base and has worked out counting rules and dismantling procedures which are essential tools for verifying compliance.

Officials who served during the Nixon, Ford, and Carter Administrations have highly praised the SCC for effectiveness. Former Secretary of Defense Harold Brown told the Senate Foreign Relations Committee in 1979 that the Soviets had responded effectively and promptly to U.S. complaints raised in the SCC concerning Soviet compliance. "In every case," he said, "the activity ceased, or subsequent information clarified the situation and allayed our concern."

Former U.S. Commissioner Robert W. Buchheim wrote in 1983: "Perhaps the most important conclusion to be drawn from SCC experience is that, despite the competition, and even at times, hostility involved in relations between the U.S. and the U.S.S.R., a durable element of cooperation is also there to be drawn upon and enhanced if attended to in an orderly and persistent fashion, even in such a heavily competitive field as strategic arms."

Reagan Administration officials, by contrast, have dismissed the SCC as worse than useless. Assistant Secretary of Defense Richard Perle said in Congressional testimony in 1984 that "the SCC has been largely unsuccessful over the years in resolving compliance concerns." He added that its effectiveness has been "exaggerated" by previous Administrations "in order to sell unverifiable arms control agreements to the U.S. Congress." Secretary of Defense Weinberger went so far in a letter to the President as to recommend a denunciation of the SCC, calling it a "diplomatic carpet under which Soviet violations have been continually swept, an Orwellian memory hole into which our concerns have been dumped like yesterday's trash."

Although the present U.S. Commissioner, former head of the Strategic Air Command General Richard N. Ellis, has not commented publicly on his job, there are reports that the Administration has not encouraged him to seek resolutions of compliance issues with the Soviet Union.

Congressman George Brown of California stated in 1986 that General Ellis had testified before the House Select Intelligence Committee that he had been discouraged from trying to resolve disputes with the Soviets by Administration officials. It has been reported also that aides to Assistant Secretary of Defense Richard Perle habitually disparage General Ellis' ability to deal effectively with the Soviets, a tactic apparently aimed at undermining his ability to influence policy toward the Soviet Union.

The Reagan Record

The Reagan Administration has made no effort to disguise its disagreement with its predecessors over the issue of Soviet compliance. Indeed it has lost no opportunity to blame previous Administrations for failing to deal effectively with the Soviets on arms limitation issues. And it has insisted that the Soviet misbehavior it alleges has been of long historical standing, not something that arose for the first time on Ronald Reagan's watch. It seems fair to say, thus, that the controversy over Soviet compliance has as much to do with the Reagan Administration's ideological biases and political partisanship as it does with the realities of Soviet behavior.

The Reagan Administration's policy on nuclear arms limitation is dominated by officials who do not believe in arms negotiations with the Soviet Union. Thus, the President's professed commitment to arms reductions has been reduced to nullity by the words and actions of officials actually charged with responsibility for policy in this area. Hardliners have seen to it that the Administration's negotiating positions are so one-sided as to be unacceptable to the Soviet Union. Indeed, the word "negotiability" has been scorned in official circles as signifying an undue concern about Soviet interests.

In the meantime, official opponents of SALT have relentlessly sought to terminate the treaty, apparently achieving their goal in November 1986 when the United States deployed its 131st bomber equipped with cruise missiles, thus actually violating the SALT limits. It seems highly questionable, in the light of this record, that this Administration is capable of agreeing on a reasonable, coherent, and negotiable arms limitation policy that could serve as a basis for resuming effective arms negotiations with the Soviet Union.

The Reagan Administration is the fifth U.S. Administration to serve since the United States and the Soviet Union began the effort to reach a strategic arms limitation agreement in the late 1960s. It is the first to fail to achieve any advance in arms negotiations, and the first to say that the SALT effort was in vain.

Conclusions

- The Reagan Administration has failed to prove its contention that the Soviet Union deliberately and systematically violates its obligations under existing arms limitation agreements.
- The Administration has created a myth of Soviet non-compliance by repeatedly representing as established facts allegations about Soviet behavior that are at best "worst case" interpretations of ambiguous evidence.
- The Administration's efforts to convict the Soviet Union of cheating is inconsistent with a serious effort to negotiate nuclear arms limitation agreements with the Soviet Union.
- An independent commission of distinguished statesmen and senior military officers is needed to examine the compliance issues and to recommend appropriate U.S. actions.

Statement by Senator J. W. Fulbright
before the Senate Foreign Relations Committee
March 11, 1987

The Meaning of the ABM Treaty

When the ABM treaty was debated and overwhelmingly approved by the Senate in 1972, neither its proponents nor opponents, nor those who had reservations but in the end voted for it, supposed that the treaty contemplated or would permit the development and testing of anti-ballistic weapons in space. The radical reinterpretation of the treaty by the Reagan administration so as to sanction its Strategic Defense Initiative runs directly counter to the plain language of the treaty, to the intent of the Nixon administration as it was explained to us at the time, and to the clear understanding of the Senate as documented by the hearings and floor debate, culminating in the approval of the treaty on August 3, 1972, by a vote of 88 to 2.

Accordingly, I endorse the resolution before the Committee as a careful, factual, precisely stated and--under the circumstances--urgently needed reaffirmation of the meaning and intent of the ABM treaty and of the Senate's understanding of that treaty in giving its advice and consent to ratification. Speaking for myself, I state categorically that, had I suspected that the ABM treaty could validly be interpreted to allow of "Star Wars" or anything resembling it, I would either have opposed the treaty or proposed a clarifying reservation or interpretation. I certainly would not have guided it through the Foreign Relations Committee and sponsored it as floor manager.

I yield to the learned lawyers in giving precise and detailed interpretation to the specific provisions of the ABM treaty, to the protocol of 1974, and to the Agreed Statements of Interpretation that accompanied the original treaty. I affirm only--but emphatically--that, taken together, these instruments can leave no reasonable doubt that the basic purpose of the ABM treaty was to prevent the parties from ever acquiring the capacity to build nationwide defense systems against strategic ballistic missiles. The intent of the treaty was to base the security of both superpowers on mutual deterrence, which is to say, on the certainty of retaliation if either were to launch an attack. It was hoped too at the time that the certainty of retaliation would eliminate or greatly reduce the need of costly and redundant offensive systems.

No one at that time, to my recollection, contemplated that systems based on technologies not then in existence would be exempt from the treaty's ban (under Article V) on development and testing as well as deployment of anti-missile systems. It was indeed precisely because of this prohibition that two senators voted against the treaty and others expressed personal reservations. Senator Buckley of New York, for example, said that he would vote against the treaty because under it we would be "denying ourselves for all time--or denying the Russians for that matter --the right to protect our civilian populations from nuclear devastation." Senator Buckley said that he was an opponent of security based on mutually assured destruction and "the ABM treaty does in fact serve to permanently institutionalize this posture." (Congressional Record - Senate, 3 August 1972, pp. 26703-4.) Senator Allen of Alabama, the only other senator to vote against the treaty, based his opposition on similar grounds, referring specifically to the possibility of future defensive systems. He said, "There is reason to believe that the United States has the scientific and technological capability of providing adequate defense against nuclear attack, and I consider it immoral and an invitation to nuclear blackmail not to develop defense against nuclear attack." (Congressional Record - Senate, 3 August 1972, p. 26766.)

Senator Thurmond of South Carolina supported the treaty but cited what he considered its drawbacks, including the exclusion of systems based on new technologies. As Senator Thurmond put it, the treaty "effectively prevents us from ever having the means to protect our population from a Soviet first strike. . . . It also prevents us from developing new kinds of systems to protect our population. The most promising type appears to be the laser type, based on entirely new principles. Yet we forgo forever the ability to protect our people." (Congressional Record - Senate, 3 August 1972, p. 26700.)

Whatever one may think of the merits of these objections, no one contested the interpretation of the ABM treaty on which they were based. Quite the contrary, supporters of the treaty understood it to represent an explicit, unqualified commitment to the strategic principle of security based on mutual deterrence and to the broader political principle of peaceful coexistence. Senator Muskie of Maine said in debate, "The significance of this treaty is that both sides have recognized that they will remain vulnerable to retaliation in a nuclear exchange, and this, in turn, greatly diminishes the prospect that either side might ever seriously consider launching nuclear war. The limit on ABMs provides the foundation for nuclear stability." (Congressional Record - Senate, 3 August 1972, p. 26769.) Senator Bellmon of Oklahoma objected to even the ABM sites allowed under the treaty for the protection of Moscow and Washington, because, as he put it, "such an arrangement removes one of the greatest deterrents to war which the world has ever known, namely the certain knowledge in the minds of governmental leaders that if they blunder or deliberately lead their nations into a nuclear war they can expect to immediately and personally suffer for their stupidity." (Congressional Records - Senate, 3 August 1972, p. 26704.) Senator McIntyre of New Hampshire--to cite one final example--asserted that the meaning of the ABM treaty was that "both sides finally recognize that no amount of money, no stroke of technological genius, no total application of national resources could ever assure either side of the capability to destroy the other without in turn being destroyed itself." (Congressional Record -Senate, 3 August 1972, p. 26763.)

Mr. Chairman, I have no wish to take up the time of the Committee with an exhaustive recounting of the debate of August 1972. I cite those proceedings to illustrate my conviction that, in approving the ABM treaty in 1972, the Senate clearly understood the prohibitions against defensive systems spelled out in Article V of the treaty to be definitive and permanent, qualified only by the provision of Article III allowing each side the option to build two ABM sites.

The executive, no less than the Senate, understood the treaty in these terms. Neither the President, the Secretary of State, nor any of the President's arms control advisers suggested that the treaty would permit of development, testing and deployment of anti-ballistic missiles in space or under any technology not then existing. The treaty was understood to represent a commitment--a permanent commitment--to security based on the strategic principle of mutual deterrence. Henry Kissinger in his memoirs comments as follows on the significance of the ABM treaty: "There was a revolutionary element in the first strategic arms limitation treaty (SALT I). . . . For the first time in history two major powers deliberately rested their security on each other's vulnerability." (Years of Upheaval, p. 256.) President Nixon, in his memoirs, is even more explicit in his understanding of the ABM agreement as a permanent commitment. He writes: "The ABM treaty stopped what inevitably would have become a defensive arms race, with untold billions of dollars being spent on each side for more and more ABM coverage. The other major effect of the ABM treaty was to make permanent the concept of deterrence through 'mutual terror'; by giving up missile defenses, each side was leaving its population and territory hostage to a strategic missile attack. Each side therefore had an ultimate interest in preventing a war that could only be mutually destructive." (RN: The Memoirs of Richard Nixon, pp. 617-618 (Emphasis supplied).) Whatever Mr. Nixon and Mr. Kissinger may think about SDI today, there is no reason to doubt that at the time of the signing of the ABM treaty they regarded the commitment to mutual deterrence as "permanent"--that is the word used by President Nixon--not as temporary, provisional or subject to abandonment upon the arrival of some exotic new technology.

The ABM treaty may also be understood in terms of the larger political commitment to peaceful coexistence--the inevitable corollary to the strategic principle of mutual deterrence. That was my understanding of it at the time, and I cannot doubt that was also the view of the administration and the Senate in that year in which East-West agreements were reached not only on SALT but on trade, on the status of Berlin and its access routes, and on cooperation in such fields as public health, pollution control, science and technology, and space exploration. I recorded my understanding of the ABM treaty and the other agreements reached in 1972 in my book, The Crippled Giant, published in September 1972:

> The agreement reached at Moscow on May 1972 limiting ABM sites and the deployment of offensive weapons was more important as an act of

> mutual commitment to coexistence than for the actual arms limitations it imposed. Indeed, giving up the ABM--except for each side retaining the option to two sites--is probably the single most significant commitment the two super powers have made to the principle of coexistence. Insofar as each side abandons the effort to make itself invulnerable to attack or retaliation by the other, it also commits itself to peace and to the survival of the other's power and ideology. The Russians in effect abandon the Marxian dream of a world communized by war; we in turn lay to rest the last vestiges of the old idea of a global crusade for freedom. These are the symbolic implications if not the immediate fact of the Moscow agreements. [The Crippled Giant, p. 46.]

Mr. Chairman, because we are concerned today with questions of legal interpretation rather than of policy, I forebear to comment on the extravagant unwisdom of "Star Wars." I note only that I know of no instance in human history in which mechanical means alone, no matter how ingenious, have kept the peace for long between hostile great powers. What one has invented the other, sooner or later and usually sooner will also invent or overcome. Peace when it has lasted has been based on the shared will to maintain peace, if not always because peace was recognized as mutually beneficial then at least because war was recognized as mutually catastrophic. I agree with Professor Thomas C. Schelling of Harvard that, in matters ranging from getting safely across a busy street to the prevention of nuclear war, "most of what we call civilization depends on reciprocal vulnerability," and that "a prudent restraint from aggressive violence that is based on acknowledgement that the world is too small to support a nuclear war is a healthier basis for peace than unilateral efforts to build defenses." ("What Went Wrong with Arms Control?" Foreign Affairs, Winter 1985/86, p. 233.)

To return to the matter at hand: The resolution before the Committee states that unassailable principle--in section 1(a)(2)--that the meaning of a treaty is informed by the interpretations spelled out in its legislative history as well as by all relevant executive communications. This is an exceedingly important principle, Mr. Chairman; it means simply and fundamentally that a law means what its framers intended it to mean and not what a later generation of policymakers would like it to mean, especially when, as in the present case, the revisionists, through sophistry and tortured logic, attach to that law a meaning diametrically opposed to the intent of its framers. The administration has the right under the ABM treaty to propose amendments or to withdraw from the treaty. It does not have the right to perform radical surgery by tortured reinterpretation. The resolution before the Committee aims to prevent that and, in so doing, to defend the constitutional role of the Senate in the making of treaties. Accordingly, this resolution should be supported by all Senators, regardless of their individual positions on SDI.

COMMENTARY

TESTING AND DEVELOPMENT OF "EXOTIC" SYSTEMS UNDER THE ABM TREATY: THE GREAT REINTERPRETATION CAPER

BY

Abram Chayes
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THE ABM TREATY AND THE STRATEGIC DEFENSE INITIATIVE

BY

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Reprinted From
HARVARD LAW REVIEW
Vol. 99, No. 8, June 1986

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Cambridge, Mass., U.S.A.

COMMENTARIES*

TESTING AND DEVELOPMENT OF "EXOTIC" SYSTEMS UNDER THE ABM TREATY: THE GREAT REINTERPRETATION CAPER

*Abram Chayes*** *and Antonia Handler Chayes****

In October 1985, the Reagan Administration proposed a sweeping new interpretation of the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems (the ABM Treaty).[1] Under this new dispensation, the ABM Treaty would permit the development and testing of anti-ballistic missile weapons based in space and using lasers, particle beams, and other novel technologies. The new interpretation is directly contrary to the position taken by the United States since 1972, when the Treaty was signed.

The issue is not simply a lawyer's quarrel or an academic exercise in textual analysis. The ABM Treaty is the only bilateral arms control agreement in full force and effect between the two superpowers. It is central to the present strategic arms control regime. Its demise would end the era of arms limitation by agreement, for if this treaty collapses, it is hard to see why either country would want to enter another one.

The new interpretation must be seen in the context of President Reagan's Strategic Defense Initiative (SDI). On March 23, 1983, the President launched this new program, challenging American science and technology to devise a defensive shield that would protect the nation against strategic nuclear missiles — that would render such weapons "impotent and obsolete."[2] Until October 1985, the SDI had been defended by government lawyers on the ground that it was confined to "research," which is not prohibited by the Treaty.[3] The proposed reinterpretation would insulate SDI from the ban of the Treaty beyond the research phase, through the stages of development and testing. The Treaty would by this interpretation prohibit only the actual deployment of a space-based system. Such a reading is a gross distortion of both the language and purpose of the Treaty.

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* The authors of these Commentaries have not seen drafts of each other's pieces. The Commentary format is not meant to be a debate, but rather is meant to present different perspectives on current issues of public importance.

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[1] Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, 23 U.S.T. 3435, T.I.A.S. No. 7503 [hereinafter cited as ABM Treaty]. On October 16, 1985, Robert McFarlane, Assistant to the President for National Security Affairs, said during a television interview: "[The terms of the ABM Treaty] make clear that on research involving new physical concepts, that that activity, as well as testing, as well as development, indeed, are approved and authorized by the treaty. Only deployment is foreclosed . . . ." 85 DEP'T OF STATE BULL. No. 2105, at 32-33 (Dec. 1985). On October 8, 1985, this position was affirmed at a White House background briefing. Wash. Post, Oct. 17, 1985, at A4. But on October 14, 1985, Secretary of State Schultz told a gathering of NATO officials that President Reagan had decided as a matter of policy to abide by the traditional interpretation of the treaty, although the new interpretation was "fully justified." *Id.*

I. THE TREATY TEXT

It should be said at the outset that realization of the goal set by President Reagan is prohibited by the Treaty. In article I(2), "Each Party undertakes not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense . . . ." Indeed, the basic purpose of the Treaty is to prevent the parties from ever acquiring the capability to establish the nationwide defense against strategic ballistic missiles that the President seeks. The question is how closely a party can approach that goal without fatally rupturing the Treaty.

A. Articles II and V

Article V(1) of the Treaty bans the testing, development, and deployment of all ABM systems other than fixed land-based systems. It states: "Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based." The comprehensiveness of this prohibition is confirmed by the equally sweeping definition of ABM systems in article II of the Treaty: "For the purpose of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, *currently* consisting of: (a) ABM interceptor missiles, . . . (b) ABM launchers, . . . ; and (c) ABM radars, ..."[4]

Despite the clarity of these provisions, the new interpretation asserts that the United States *can* develop and test space-based antiballistic missile systems without violating the Treaty provided they are based on "other physical principles"[5] (such as lasers or particle beams) than those employed by the systems in use when the Treaty was concluded in 1972.

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[2] Address of President Reagan to the Nation on Defense and National Security, PUB. PAPERS 437, 443 (Mar. 23, 1983).

[3] DEP'T OF DEFENSE, REPORT TO CONGRESS ON THE STRATEGIC DEFENSE INITIATIVE 1985, app. B.

[4] ABM Treaty, *supra* note 1, art. II, 23 U.S.T. at 3439, T.I.A.S. No. 7503, at 5 (emphasis added).

By what legerdemain can the straightforward prohibition of article V(1) be converted into a limited ban on development and testing of 1970's technology only? The State Department Legal Adviser sought to accomplish this result by turning the comprehensive definition of ABM systems contained in Article II(1) into a limiting definition, confined to systems comprising the three conventional components: missiles, launchers, and radars. According to the Legal Adviser's testimony: "[Article II] can more reasonably be read to mean that the systems contemplated by the treaty are those that serve the functions described *and* that currently consist of the listed components."[6]

Article II is on its face a *functional* definition. It defines the prohibited systems on the basis of performance, not technology. The word "and" does not appear in the Treaty text. Even if it did, it is hard to see how it would convert the language of subparagraphs (a), (b), and (c) into words of limitation. The natural reading of the phrase "currently consisting of" makes the system description that follows illustrative, not limiting.

The legislative history supports this common-sense interpretation. When the ABM Treaty was transmitted by the President to the Senate for advice and consent, it was accompanied by a detailed "Report by Secretary of State Rogers to President Nixon on the Strategic Arms Limitation Agreements."[7] Statements made by the President and his senior officials in presenting the Treaty to the Senate have particular weight on questions of the interpretation of the treaty. The Senate's understanding of the treaty on which it acts depends on the interpretations provided by the President, who negotiated the treaty. Such interpretations are decisive with respect to the obligations assumed by the United States.[8]

The report of Secretary Rogers expressly and unambiguously affirms the functional character of the Article II definition: "Article II(1) defines an ABM system in terms of its *function* as 'a system to counter strategic ballistic missiles or their elements in flight trajectory,' noting that such systems 'currently' consist of ABM interceptor missiles, ABM launchers, and ABM radars."[9] This passage appears at the beginning of the section of the report entitled "*Future ABM Systems*," and obviously is intended to explain the applicability of the Treaty to such future systems. The quoted passage directly contradicts the contention of the Legal Adviser that the definition is limited to systems using conventional technology. Secretary Rogers' report makes clear that the enumeration of the components is an illustrative reference to systems currently in use, not a limitation of the coverage of the Treaty.

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[5] ABM Treaty, *supra* note 1, Agreed Statement D, 23 U.S.T. at 3456, T.I.A.S. No. 7503, at 22.

[6] *ABM Treaty Interpretation Dispute: Hearing Before the Subcomm. on Arms Control, Int'l Security and Science of the House Comm. on Foreign Aff.*, 99th Cong., 1st Sess. 4, 13 (1985) (statements of Abraham D. Sofaer, Legal Adviser, Department of State) [hereinafter cited as *Hearings on Interpretation*]. Following his testimony, the Legal Adviser presented to the committee a memorandum he had prepared for Ambassador Nitze entitled "Analysis of United States and Soviet Postnegotiation Public Statements Interpreting the ABM Treaty's Application to Future Systems." *Id.* app. 15, at 200 [hereinafter cited as Sofaer Memorandum].

[7] 67 DEP'T OF STATE BULL. 3 (1972) [hereinafter cited as *Report by Secretary of State Rogers*].

[8] *See* RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 326(1) & comments a & b (Tent. Draft No. 6) (1985).

The Legal Adviser is able to adduce no support for his position that article II is a limiting definition, either in the legislative history or in contemporaneous or later accounts by officials associated with the negotiating or ratification process. In fact, as Dr. Raymond Garthoff, the Executive Secretary and a Senior Adviser in the United States delegation that negotiated the Treaty, tells us:

> the word "currently" was deliberately inserted into a previously adopted text of Article II at the time agreement was reached on the future systems ban in order to have the very effect of closing a loophole to the ban on futures in both Articles III and V (and several others).[10]

If the draftsmen had wanted a limiting definition, they had it in the "previously adopted text" to which Dr. Garthoff refers. We know from his account that this penultimate text defined an ABM system as "a system to counter strategic ballistic missiles . . . in flight trajectory, consisting of . . . missiles, . . . launchers, . . . and radars." There could be no conceivable reason for deliberately inserting the word "currently" into that sentence if the intention had been to maintain a limiting definition. As the discussion below of the negotiating history shows, the purpose of this drafting change was to ensure the comprehensive coverage of future systems by means of the definition of the term "ABM systems," instead of dealing with the matter by special language in the substantive provisions of the Treaty, as had been originally sought by the United States.

Once the functional character of the article II definition is established, the reading of article V to ban development and testing of space-based systems using future technology is inescapable. This reading is also fully supported by the legislative history. The Rogers report itself does not state expressly that article V applies to "exotic" as well as conventional systems. But other key administration witnesses testified categorically that it does so apply. Secretary of Defense Laird, for example, in a written response to a question from Senator Goldwater of the Senate Armed Services Committee concerning "development of a boost-phase intercept capability or lasers," replied:

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[9] *Report by Secretary of State Rogers*, *supra* note 7, at 6 (emphasis added).

[10] INT'L SECURITY, Summer 1977, at 107, 108 (replying to a letter to the editor which commented on an article written by Dr. Garthoff entitled *Negotiating with the Russians: Some Lessons from SALT*, INT'L SECURITY, Spring 1977, at 3).

> There is . . . a prohibition on the development, testing, or deployment of ABM systems which are space-based, as well as sea-based, air-based, or mobile land-based. The U.S. side understands this prohibition not to apply to basic and advanced research and exploratory development of technology which could be associated with such systems, or their components.
>
> There are no restrictions on the development of lasers for fixed, land-based ABM systems. The sides have agreed, however, that deployment of such systems . . . shall be subject to discussion in accordance with article XIII . . . and agreement in accordance with article XIV . . . .[11]

This is an explicit confirmation by the Secretary of Defense that article V does prohibit development and testing of space-based systems embodying new physical principles, such as lasers. It is not cited by the Legal Adviser in his testimony and memorandum in support of the reinterpretation. Dr. John Foster, Director of Defense Research and Engineering, the official in the Defense Department directly responsible for all research on exotic ABM systems, also confirmed this interpretation of article V.[12]

The Senate fully understood the import of these statements by high-ranking administration witnesses. Senator Thurmond supported the Treaty, but mentioned among his reservations: "It also prevents us from developing new kinds of systems to protect our population. The most promising type appears to be the laser type, based on entirely new principles. Yet we forgo forever the ability to protect our people."[13] Senator Buckley, one of the two who voted against the Treaty, was even more specific: "[A]rticle V of the ABM treaty . . . would have the effect . . . of prohibiting the development and testing of a laser type system based in space . . . . The technological possibility has been formally excluded by this agreement."[14]

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[11] *Military Implications of the Treaty on Limitations of Anti-Ballistic Missile Systems and the Interim Agreement on Limitation of Strategic Offensive Arms: Hearings before the Senate Comm. on Armed Services*, 92nd Cong., 2nd Sess. 40–41 (1972) [hereinafter cited as *Hearings on Military Implications*]. At the time the Army had a fixed land-based laser research and development program to which it and its supporters in the Senate attached great importance. *See id.* at 30–31. Thus, the colloquy quoted in the text is designed to establish that despite the sweeping prohibitions on testing and deployment of space-based exotics, the Treaty protects the Army program. The reference in the testimony to "basic and advanced research and exploratory development" is to standard Pentagon budget categories and excludes field testing and development.

[12] The following dialogue took place between Dr. Foster and Senator Jackson before the Armed Services Committee:

> Senator JACKSON. . . . does the SALT agreement prohibit land-based laser development?
> Dr. FOSTER. No sir; it does not. [Deleted.] . . . .
> Senator JACKSON. . . . Article 5 says each party undertakes not to develop and test or deploy ABM systems or components which are sea based, air based[,] space based or mobile land based.
> Dr. FOSTER. Yes sir; I understand. We do not have a program to develop a laser ABM system.
> Senator JACKSON. If it is sea based, air based, space based, or mobile land based. If it is a fixed land-based ABM system, it is permitted; am I not correct.
> Dr. FOSTER. That is right.

Hearings on Military Implications, *supra* note 11, at 274–75.

There is not a single positive statement in the legislative history interpreting article V as limited to current technology. Secretary Rogers does not mention exotic systems in describing that article, but he does expressly adopt a functional reading of the article II definition of ABM systems. That reading necessarily entails that the ban on development and testing in article V apply comprehensively to all space-based ABM systems, whether composed of 1972-type components or using other physical principles. Witnesses sometimes referred to the ban on deployment of exotic ABM systems without mentioning the limitations on development and testing. But whenever the Senate expressly addressed the issue of future systems, administration witnesses stated unequivocally that such systems were covered by article V.

B. Article III and Agreed Statement D

Although articles II and V are the most directly relevant to the present controversy, two other provisions, article III and Agreed Statement D, are also closely involved. Article III contains the only explicit exception to the Treaty's sweeping prohibitions. It permits deployment of fixed land-based systems at two sites — one around a party's national capital and one at a missile field — and it circumscribes in detail the type and quantity of allowable components.[15] Agreed Statement D is one of a set of Agreed Statements initialed by the heads of the two delegations and appended to the Treaty. The statements were used as a drafting device to clarify specific points or remove possible ambiguities in more general language in the body of the Treaty. They were transmitted to the Senate as part of the Treaty.[16] Agreed Statement D provides:

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[13] 118 CONG. REC. 26,700 (1972).

[14] *Id.* at 26,703.

[15] The number of permissible sites was later reduced to one by a protocol adopted in 1974. Protocol on the Limitation of Anti-Ballistic Missile Systems, July 3, 1974, art. I, 27 U.S.T. 1645, 1648, T.I.A.S. No. 8276. Article III of the Treaty provides detailed limitations on the area of a permitted ABM system site (a radius of 150 kilometers), the number of missiles and launchers (100 each), and the number of radars that may be deployed at each permitted site. ABM Treaty, *supra* note 1, art. III, 23 U.S.T. at 3440, T.I.A.S. No. 7503, at 6. In addition, under article IV, testing of fixed land-based ABMs is severely restricted. *See id.*, art. IV, 23 U.S.T. at 3441, T.I.A.S. No. 7503, at 7.

> In order to insure the fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII [establishing the Standing Consultative Commission] and agreement in accordance with Article XIV [the amending article] of the Treaty.[17]

The Legal Adviser argues that because Agreed Statement D is the only part of the Treaty that specifically mentions future technologies, it must be taken as setting forth the rules that govern their treatment. Thus, as to systems "based on other physical principles," only deployment is prohibited. This argument assumes the validity of the interpretation of article II as a limiting definition, embracing only conventional ABM systems and excluding all exotic systems from the prohibitions on testing and development in article V. The Legal Adviser denies that the prohibition in Agreed Statement D is addressed to fixed land-based systems only: "Nothing in that statement suggests that it applies only to future systems that are fixed land based . . . ."[18]

But the Agreed Statement *does* indicate that it is confined to fixed land-based systems. The inducing clause recites that its purpose is to "insure the fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty." And as we have seen, the deployments permitted under article III are fixed land-based systems using 1970s-type technology.[19]

The Legal Adviser would have us believe that the Agreed Statement, tacked on at the end of the Treaty, imposed a new and far-reaching substantive prohibition on the deployment of exotic systems not found elsewhere in the instrument. The statement's role is much more modest, however, and much more appropriate to the character of such statements. As suggested in the inducing clause, it clarifies and strengthens the obligations of article III. In that article, the limits on deployments at the permitted sites are expressed in terms of missiles, launchers, and radars, the components of systems then in use. Because article III begins with an undertaking "not to deploy ABM systems or their components except" as provided in the article, the implication is that only systems using such components, that is, conventional technology, could be deployed. Agreed Statement D makes this implicit limitation explicit by stating expressly that deployment of systems based on exotic technology is prohibited by the obligations undertaken in Article III.

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[16] *See Report by Secretary of State Rogers*, *supra* note 7, at 4 (explaining transmittal of Agreed Statements with Treaty text).

[17] ABM Treaty, *supra* note 1, Agreed Statement D, 23 U.S.T. at 3456, T.I.A.S. No. 7503, at 22.

[18] *Hearings on Interpretation*, *supra* note 6, at 6. Note that Agreed Statement D itself, contrary to the Legal Adviser's position, uses the term of art "ABM systems" when referring to systems using exotic technology. ABM Treaty, *supra* note 1, Agreed Statement D, 23 U.S.T. at 3456, T.I.A.S. No. 7503, at 22.

[19] *See infra* p. 1961 & note 15.

There is a further special reason for a statement emphasizing the prohibition on the deployment of fixed land-based exotics. As noted above, article III establishes strict limitations on the firepower and targeting capabilities of systems deployed at the permitted ABM sites. These limitations are designed to ensure that deployments at those sites could not function as systems for the defense of national territory or as a base for such systems, in violation of article I. The constraints were expressed in terms of the then-current technology — primarily as quantitative ceilings on the number of missiles, launchers, and radars.[20] These quantitative restrictions would have no meaning in relation to systems "based on other physical principles." If such systems were "created in the future," therefore, the parties would have to discuss how or even whether comparable restrictions on firepower and capability of the new technology could be devised.

Finally, the Legal Adviser's reading of Agreed Statement D makes an absurdity out of the text of the Treaty proper. In his analysis, the body of the Treaty would not prohibit deployment of exotic systems unless they were fixed land-based. But for Agreed Statement D, he says, the Treaty would prohibit deployment of such systems only where conventional deployment was permitted, and allow deployment in all environments where conventional systems were prohibited. Is it conceivable that a treaty text, hammered out over two years of arduous negotiations and review, would mandate such an absurdly self-contradictory result, to be rescued, and then only partially, by the device of an Agreed Statement, appended at the last moment?

C. The Purpose of the Treaty

The interpretation of solemn obligations affecting the security of the United States and the world demands more than playing word games with the text to see what meanings it can be made to bear. The fundamental reason why the reinterpretation of the treaty is unacceptable is that it reflects no intelligible policy or purpose.

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[20] *See supra* note 15. There are qualitative limitations as well. *See* ABM Treaty, *supra* note 1, art. V(2), 23 U.S.T. at 3441, T.I.A.S. No. 7503, at 7 (prohibiting development, testing, and deployment of multiple warhead ABM missiles or rapid-reload launchers).

The essential assurance each side sought in the ABM Treaty was that the other was not working to achieve an effective territorial defense against ballistic missiles. For this purpose, a simple prohibition on deployments was not enough. If only deployment were prohibited, one side might bring a system through the process of research, development, and testing to the very brink of deployment — and then escape the treaty constraints by withdrawal (permitted on six months notice under article XV(2)) or simply by repudiation.

The United States was particularly concerned to guard against this "breakout" possibility. It sought positive limitations to increase the lead-time between the moment when a party might decide to try for an ABM system and the time when it could achieve one. Expanding this lead-time itself reduced any incentive for noncompliance, because it meant that the United States would have time to respond to a breakout attempt before the Soviets could capitalize on it. Many of the detailed provisions of the Treaty reflect this concern.[21]

There is simply no basis for distinguishing between conventional and exotic technologies in terms of the danger of breakout. It would have made no sense at all to spend four years in painful negotiation to ensure against breakout from the Treaty with conventional systems, while at the same time permitting free testing and development of "future" systems, as to which the uncertainties were very much greater, right up to the point of deployment.[22]

Consistent with these interests and concerns, many U.S. officials, as noted below, intially wanted a complete ban on futuristic systems.[23] The bureaucratic muscle of the Army, which had a research and development program for fixed ground-based lasers under way, was strong enough to prevent this comprehensive solution.[24] The final U.S. position reflected an internal compromise: development and testing in the fixed land-based mode but not otherwise, and no deployment at all. According to U.S. participants in the negotiations,[25] that was the position that ultimately prevailed. The limited compromise made sense given the configuration of domestic bureaucratic and political forces. To have accepted a treaty that severely limited conventional technologies but let exotics run free, however, would have negated the very purpose for which the negotiation was begun in the first place.

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[21] *See, e.g.*, ABM Treaty, *supra* note 1, arts. III, IV & V (limiting development and testing); art. III (restricting deployment in permitted areas); art. V(2) (prohibiting rapid-reload launchers and multiple warhead missiles); art. VI(a) (attempting to limit the possibility of "up-grading" anti-aircraft systems and prohibiting "testing in an ABM mode"); art. VI(b) (limiting radar deployment).

[22] Moreover, although the discussion of the reinterpretation has focused to date on its application to space-based systems, it would necessarily apply as well to mobile land-based ABMs, which are also covered in article V. In 1972, U.S. worries about mobile land-based systems were particularly acute, as they are today. A provision permitting development and testing of such systems if they employed exotic but not conventional technologies would have raised serious verification problems.

[23] *See infra* pp. 1966–67 & notes 32-33.

[24] *See supra* note 11.

[25] *See infra* p. 1966 & note 30.

In summary, the basic aim of the Treaty is to bar defense of the national territories of the parties against strategic ballistic missiles. It thus embodies the strategic theory of mutual deterrence based on assured retaliatory capacity of each side. In addition, it would reduce the impetus for an upward spiral in offensive arms, which was to be controlled by the companion Interim Agreement on the Limitation of Strategic Offensive Arms.[26]

Accordingly, the definition of ABM systems in article II is cast in terms of system function rather than system technology, and covers future as well as "current" systems. It follows that the article V prohibition against testing, development, and deployment of all but fixed land-based systems applies to systems based on exotic as well as 1972-type technologies. The only exception to these prohibitions is the testing and development at agreed test ranges and deployment of fixed land-based systems at two sites (now one), subject to strict quantitative and qualitative limitations, as provided in articles III and IV. The limits in article III refer to missiles, launchers, and radars, thus implicitly confining deployment to systems using conventional technology. Agreed Statement D clarifies article III by making explicit this prohibition against replacing any or all of the permitted deployments by exotic fixed land-based systems, except with the concurrence of the other party.

II. THE NEGOTIATING RECORD

The Legal Adviser asserts that the reinterpretation is supported by the classified negotiating record. "The parties," he says, "did not agree to ban development and testing of such systems or components, whether on land or in space."[27] He contends that although U.S. negotiators tried to obtain a ban on development and testing of future systems, "the record of the negotiations fails to demonstrate that they actually succeeded in achieving their objective . . . [T]hey failed to obtain the ban they sought . . . ."[28] In a recent address to the American Society of International Law, he stated that the Soviets refused to accept language proffered by the American delegation (presumably as a part of what became article V) prohibiting development and testing of "future devices."[29]

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[26] *See, e.g.*, *Hearings on Military Implications*, *supra* note 11, at 286 ("The treaty, by permitting only a small deployment of ABMs, tends to break the offense/defense action and reaction spiral in strategic arms competition.") (statement by Ambassador Gerard C. Smith); *The Moscow Summit: New Opportunities in U.S.–Soviet Relations*, Address by President Nixon to the Congress, 66 DEP'T OF STATE BULL. 855, 857 (1972) ("[T]he [ABM] agreements forestall a major spiraling of the arms race . . . .").

[27] *Hearings on Interpretation*, *supra* note 6, at 7.

Because the record is secret, these statements cannot be directly contradicted. But contemporaneous accounts, the recollections of participants in the negotiations, and on-the-record statements of officials with access to the classified materials provide glimpses of the negotiating history. According to the recollections of Ambassador Gerard C. Smith, the head of the delegation, and other delegation members no longer in government, the Soviets understood and accepted article V as a ban on development and testing of future exotic systems and components.[30]

No doubt there were disagreements between the two sides over language and draftsmanship. Such semantic battles are common in long and hard-fought negotiations. In the end, as Dr. Garthoff stated before the present controversy arose,[31] they were resolved by the insertion of the word "currently" into the definition of ABM systems in article II to ensure that systems using new technologies and composed of different components would be covered by the ban on testing and development in article V.

John Newhouse, in his authoritative book *Cold Dawn*, gives an account of the evolution of the U.S. negotiating position. He tells us that at first U.S. officials favored a complete ban on exotic systems. On July 2, 1971, it was proposed "to ban exotics by specifying that everything not allowed in a SALT agreement was forbidden."[32] The proposal was the subject of debate within the U.S. government. The controversy was resolved by National Security Decision Memorandum 127 that "banned everything other than research and development on fixed land-based exotics."[33] When the position was presented in Geneva, there was at first some hesitation by the Soviet Union. But, Newhouse relates, "toward the end of January . . . the Soviets accepted the U.S. position on exotic systems."[34]

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[28] *Id.* at 8.

[29] Speech by Abraham D. Sofaer, Legal Adviser, Dep't of State, American Society of International Law Annual Meeting, in Washington, D.C. (Apr. 11, 1986) (tape on file at the Harvard Law School Library).

[30] *See Reagan Team Justifies Star Wars Plan By Claiming Loophole in ABM Treaty*, Wall St. J., Oct. 22, 1985, at 64, col. 1. For example, John Rhinelander, the Legal Adviser to the delegation, writing shortly after the adoption of the Treaty, lays out in detail the traditional interpretation of articles III and V and Agreed Statement D:

> The future systems ban applies to devices which would be capable of substituting for one or more of the three basic ABM components, such as a "killer" laser or a particle accelerator. Article III of the treaty does not preclude either development or testing of fixed land-based devices which could substitute for ABM components, but does prohibit their deployment. Article V, on the other hand, prohibits development and testing, as well as deployment, of air-based, sea-based, space-based, or mobile land-based ABM systems or components, which includes "future systems" for those kinds of environments. The overall effect of the treaty, therefore, is to prohibit any deployment of future systems and to limit their development and testing to those in a fixed land-based mode.

SALT: THE MOSCOW AGREEMENTS AND BEYOND 128 (M. Willrich & J. Rhinelander eds. 1974), *reprinted in Hearings on Interpretation*, *supra* note 6, app. 23, at 247, 250. On November 21, 1985, Mr. Rhinelander confirmed this account in testimony before the Subcommittee on Strategic and Theater Nuclear Weapons of the Senate Armed Services Committee.

[31] *See supra* note 10 and accompanying text.

[32] J. NEWHOUSE, COLD DAWN: THE STORY OF SALT 230 (1973).

If, as the Legal Adviser asserts, "the Soviets refused to go along, and no such agreement was reached,"[35] established State Department procedures would have required the delegation to send a reporting telegram explicitly stating that they had failed to carry out their instructions on that issue. Indeed, the delegation could not have agreed to a text that rejected the U.S. position on such an important point without express permission from Washington. Such a telegram would be a part of the negotiating record. The Legal Adviser's theory of an undocumented "failure to agree" is simply implausible to anyone familiar with State Department procedures.

Moreover, the practice in the SALT I negotiations when the Soviets refused to accept a major U.S. position was not simply to walk away in silence. A special device, the unilateral statement, was used to deal with such situations. These statements acknowledge that the parties have failed to reach agreement on a point of particular interest to the United States and assert in substance that the United States will regard conduct inconsistent with the U.S. position as inconsistent with the agreement.[36]

The unilateral statement technique was used in the Interim Agreement with respect to land-mobile missiles.[37] In that case, the Soviets refused an explicit prohibition on mobility that had been a major U.S. negotiating objective. The unilateral statement put the U.S. position on the public record so that the Soviets would have no doubt about it. If that format was appropriate with respect to the disagreement over land-mobile ICBM launchers, why not as to testing and development of exotic ABM systems?

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[33] *Id.* at 231. For a discussion of the importance the Army attached to its fixed land-based laser program, see note 11 above.

[34] J. NEWHOUSE, *supra* note 32, at 237.

[35] *Hearings on Interpretation*, *supra* note 6, at 7.

[36] UNITED STATES ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS 146-47, 156-57 (1980). This technique was used with respect to the definition of "tested in an ABM mode" within the meaning of article VI, increases in the defenses of Soviet early warning radars, the definition of "heavy" ICBM's, and deployment of land-mobile ICBM launchers. The latter two unilateral statements are appended to the Interim Agreement on Limitation of Strategic Offensive Arms, concluded simultaneously with the ABM Treaty. The unilateral statements were presented to the Senate along with the Treaty.

[37] The unilateral statement on land-mobile ICBM launchers in the companion Interim Agreement on strategic offensive weapons is as follows:

> [I]n the interest of concluding the Interim Agreement the U.S. Delegation now withdraws its proposal that Article I or an agreed statement explicitly prohibit the deployment of mobile land-based ICBM launchers. I have been instructed to inform you that, . . . the U.S. would consider the deployment of operational land-mobile ICBM launchers during the period of the Interim Agreement as inconsistent with the objectives of that Agreement.

Id. at 156.

Finally, the Legal Adviser's reliance on the still-classified negotiating record raises an issue of principle that is not affected by the actual content of that record.[38] Members of the Senate Armed Services Committee have requested access to the negotiating record, so far unsuccessfully.[39] The Senate, under the Constitution, is a full partner in the treaty-making process. Is it consistent with the constitutional structure for the Executive, more than a decade after the Treaty was ratified, to advance an interpretation, based on secret materials that were not before the Senate when it gave its advice and consent and are not now available to it? More broadly, is such a procedure consistent with the requirements of accountability in a democratic polity?

If the Legal Adviser continues to rely for his conclusion on an admittedly arguable reading of the negotiating record, it seems to us that he is under an obligation to make the relevant portions public. If that is impossible because of the requirements of confidentiality in international negotiations, then interpretation of the Treaty must be based solely on the text and the public record.

III. Subsequent Interpretation

As a matter of United States law and under international canons of construction, consistent interpretation of the meaning of an enactment by the administrative bodies charged with its implementation is entitled to very great weight.[40] The consistent interpretation of article V by U.S. agencies supports the traditional interpretation.

Each year since 1978, the Arms Control and Disarmament Agency has been required by law to prepare an Arms Control Impact Statement for presentation to Congress.[41] Through fiscal year 1985, each of these statements, without exception, including those prepared by the Reagan Administration, explicitly endorses the traditional interpretation.[42] The latest such statement for fiscal 1985 says: "The ABM Treaty prohibition on development, testing and deployment of space-based ABM systems, or components for such systems, applies to directed energy technology (or any other technology) used for this purpose."[43]

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[38] *See* Case Concerning the Jurisdiction of the European Commission of the Danube, 1927 P.C.I.J., ser. B, No. 14, at 32 (Dec. 8, 1927) (refusal by the Permanent Court of International Justice to consider "confidential" negotiating record).

[39] National Campaign to Save the ABM Treaty, Fact Sheet No. 5: Legal Issues Relating to Reinterpreting the Anti Ballistic Missile Treaty 4.

[40] *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 152 (1965); *see also, e.g.*, Factor v. Laubenheimer, 290 U.S. 276, 294–98 (1933) (noting that executive interpretation of a treaty provision is entitled to considerable weight). For the position at international law, see VIENNA CONVENTION ON THE LAW OF TREATIES, art. 31(3)(b), at 49 (1978) and 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 399–402 (1970).

[41] *See* 22 U.S.C. § 2590 (1982)

Moreover, the Strategic Defense Initiative Organization (SDIO), the entity in the Department of Defense with responsibility for the conduct of the Star Wars program, has heretofore operated on the assumption that the traditional interpretation of the Treaty applies to the program. In its 1985 report to Congress on the compliance status of the program, it acknowledges that:

> The ABM Treaty prohibits the development, testing, and deployment of ABM systems and components that are space-based, air-based, sea-based, or mobile land-based. However, that agreement does permit research short of field testing of a prototype ABM system or component. This is the type of research that will be conducted under the SDI program.[44]

The report then justifies each of the fifteen tests or experiments proposed through fiscal year 1988 as falling into one of three categories, none of which, it contends, are prohibited by the Treaty: (1) "research," (2) development of "subcomponents," or (3) anti-satellite weapons testing.[45] Although these justifications can be challenged on their own terms, there would have been no need whatever for this elaborate legal analysis in the SDIO report if the Legal Adviser's reinterpretation were an accurate statement of the law.

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[42] The first such statement, for fiscal year 1979, reads as follows:

> Article V . . . prohibits the development, testing or deployment of all types of ABM systems or their components that are sea-based, air-based, space-based, or mobile land-based . . . . Article II defines an ABM system as a 'system to counter strategic ballistic missiles or their elements in flight trajectory' and describes current systems as consisting of ABM interceptor missiles, ABM launchers and ABM radars. [deleted][sic] Thus, [particle beam weapons] used for [ballistic missile defense] which are fixed land-based could be developed and tested but not deployed without amendment of the ABM Treaty, and the development, testing, and deployment of such systems which are other than fixed land-based is prohibited by article V of the treaty.

Fiscal Year 1979 Arms Control Impact Statements, 95th Cong., 2d Sess. 231 (1978) (footnotes omitted).

[43] Fiscal Year 1985 Arms Control Impact Statements, 98th Cong., 2d Sess. 252 (1984); *accord* Fiscal Year 1984 Arms Control Impact Statements, 98th Cong., 1st Sess. 266–67 (1983); Fiscal Year 1983 Arms Control Impact Statements, 97th Cong., 2d Sess. 321 (1982); Fiscal Year 1982 Arms Control Impact Statements, 97th Cong., 1st Sess. 393–94 (1981); Fiscal Year 1981 Arms Control Impact Statements, 96th Cong., 2nd Sess. 453 (1980); Fiscal Year 1980 Arms Control Impact Statements, 96th Cong., 1st Sess. 100 (1979).

[44] DEP'T OF DEFENSE, *supra* note 3, app. B at B-2.

[45] *Id.* app. B at B-4 to B-9.

CONCLUSION

A dozen years after the United States undertook in the ABM Treaty "not to deploy ABM systems for a defense of the territory of its country," the current U.S. Administration has decided that it wants to do just that if it can. From this perspective, it is not hard to deduce the origin of the reinterpretation. Although the SDI test program through 1988 might be plausibly defended under the traditional interpretation of the Treaty, subsequent stages cannot. Assistant Secretary of Defense Richard Perle testified before the Subcommittee on Strategic and Theater Nuclear Forces of the Senate Armed Services Committee that we cannot "make an intelligent decision [on whether to develop an SDI system] on the basis of the kind of testing permitted under the restricted [interpretation of the ABM Treaty]."[46] The Administration seeks to escape this difficulty by the simple expedient of reinterpreting the Treaty to read out the constraints, always assumed to be part of the Treaty, on development and testing of space-based exotic systems.

Such a procedure has a number of disturbing implications. Treaties are the supreme law of the land. They are not made by the President alone, but by the President with the advice and consent of the Senate. Although the Executive Branch has always contended that the President can unilaterally terminate a treaty, even the State Department has never argued that he can modify or alter a treaty obligation without the consent of the Senate.[47] Moreover, treaties are not only the law of this land. They also represent a solemn engagement between nations, binding at international law. The terms of that engagement cannot be altered by one of the parties without the consent of the other.

The interpretation of treaties, like the interpretation of statutes and contracts, is the business of lawyers. In our system, lawyers represent clients, and the Canons of Ethics impose an obligation of zealous representation of the client's interest, to the subordination of almost all other considerations.[48] The extent of that obligation has been questioned even in the context of the representation of private clients by private lawyers.[49] But nobody has ever supposed that it applied in anything like its full force to government lawyers. Attorney General William D. Mitchell is reputed to have said, "The government wins when justice is done."

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[46] *SDI Testing Is Reviewed in Light of Treaty Terms*, Wash. Post, Mar. 26, 1986, at 6, col. 5.

[47] *See Treaty Termination: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. 214 (1979); *see also, e.g.*, Coplin v. United States, 6 Ct. Cl. 115, 144-45 (1984) (holding that the President cannot unilaterally modify a treaty obligation on the basis of documents not approved by the full Senate), *rev'd on other grounds*, 761 F.2d 688 (Fed. Cir. 1985).

[48] Canons of Professional Ethics Canon 15 (1952); *see* Model Rules of Professional Conduct Rule 1.3 (1983); Model Code of Professional Responsibility Canon 7, EC 7-1 (1980).

[49] *See, e.g.*, J. Auerbach, Unequal Justice (1974); *President of Harvard Brands Legal*

Government lawyers whose field is international law — State Department lawyers — labor under an even heavier constraint. Many of the questions they are asked to consider are nonjusticiable. Their zeal on behalf of their client cannot be reviewed and, if necessary, righted by a neutral tribunal. They have, in a certain sense, the final responsibility for the integrity of the international legal system in which they work.

That responsibility has a special force when the questions at issue implicate arms control treaties. Some significant part of the safety and security of the globe depends on a regime of good faith compliance and action under such treaties, on both sides. It is a fragile skein, easily torn and not quickly mended. To maintain and foster that regime is a prime responsibility of international lawyers, outside of government or in. It is a responsibility equal in dignity to the one we owe our clients. It invokes the highest duty of the lawyer — fidelity to the law itself.

The administration's proposed reinterpretation of the ABM Treaty does not meet these standards.

System Costly and Complex, N.Y. Times, Apr. 22, 1983, at A1, col. 6 (criticism of the adversary system by President Derek Bok of Harvard University).

THE ABM TREATY AND THE STRATEGIC DEFENSE INITIATIVE

Abraham D. Sofaer[1]

This is a welcome opportunity to exchange views on the proper meaning of the Anti-Ballistic Missile (ABM) Treaty[2] as it applies to "exotic" systems and components.[3] The task of interpreting this Treaty is in part technical, requiring careful analysis and application of the rules normally used in construing international agreements. The task is also, however, a sensitive political issue. The interpretation that is found to be correct bears upon whether the United States and the U.S.S.R. may engage in development and testing of exotics in mobile basing modes, such as those contemplated by the Strategic Defense Initiative (SDI). Many people have such intense attitudes toward SDI that they are unable or unwilling to treat questions of this Treaty's interpretation as other than a reflection of political ideology or strategic purpose.

The ABM Treaty was signed and ratified by the United States and the U.S.S.R. in 1972. It is concise and elegant as treaties go. The Treaty was intended to form one part of a regime to govern nuclear weapons. In signing the Treaty, each party undertook not to deploy ABM systems in defense of its territory or to provide a base for such a defense.[4] Each promised not to deploy antiballistic missile systems in defense of an individual region, with a limited exception: each party is permitted to deploy ABM systems and components in one circumscribed "deployment area" and at certain specified test ranges.[5] In addition, and of particular importance to the present debate, article V of the Treaty provides that no ABM system or component may be tested, developed, or deployed if it is space-based, sea-based, air-based, or mobile land-based.[6]

In an "Agreed Statement" accompanying the Treaty, the parties provided that if ABM systems and components "based on other physical principles" — that is, technologies not used in the systems and components described and regulated in the Treaty — were created in the future, they could be deployed only after the parties had formally discussed them and agreed on specific limitations.[7] This provision — Agreed Statement D — is at the core of the current controversy. According to the "broader" reading of the Treaty, this provision reflects the fact that the parties anticipated the creation of ABM systems and components based on "other physical principles" than those in use in 1972 and that the parties did not agree to restrain necessary research, development, and testing. Those who read the Treaty "restrictively," however, claim that article V prohibits the development, testing, or deployment of all but fixed land-based systems, whether or not those systems rely on technologies used at the time the Treaty was signed. Because some of the defensive systems contemplated by the SDI program would involve space-based devices, the restrictive interpretation would severely restrict work on SDI components beyond the research stage. This Commentary explains why both the Treaty itself and the record of the negotiations that led up to its signing support the broader reading.

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[1] Legal Adviser, United States Department of State. The author appreciates the valuable assistance of Boris Feldman, Esq., of his staff in the preparation of this Commentary.

[2] Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-U.S.S.R., 23 U.S.T. 3435, T.I.A.S. No. 7503 [hereinafter cited as ABM Treaty].

[3] The term "exotic" systems and components does not appear in the ABM Treaty, but has become a shorthand reference for ballistic missile defense devices based on physical principles other than those in use when the Treaty was signed. Such devices are sometimes referred to as "future" or "futuristic" components.

[4] *See* ABM Treaty, *supra* note 2, art. I(2), 23 U.S.T. at 3438, T.I.A.S. No. 7503, at 4.

[5] *See id.* arts. III, IV, 23 U.S.T. at 3440–41, T.I.A.S. No. 7503, at 6–7. Although the Treaty originally allowed each party to deploy ABM systems in two areas, the parties subsequently agreed to limit deployment to one area in each country.

[6] *See id.* art. V(1), 23 U.S.T. at 3441, T.I.A.S. No. 7503, at 7.

I. TEXTUAL ANALYSIS

The principal argument for a restrictive interpretation of the Treaty is that, because article V prohibits the testing, development, or deployment of all "ABM systems or components" that are based in space, water, or air, or are mobile land-based, only fixed land-based systems and components may be developed and tested. Any effort to find an exception to this clear and absolute prohibition, we are told, is only the latest of a series of politically motivated reinterpretations, designed to avoid the Treaty's restrictions.[8]

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[7] Agreed Statement D provides that:

> In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty.

ABM Treaty, *supra* note 1, Agreed Statement D, 23 U.S.T. at 3456, T.I.A.S. No. 7503, at 22.

Article XIII provides for the establishment of a "Standing Consultative Commission" to resolve questions regarding compliance with the Treaty. Article XIV provides for amendment of the Treaty.

[8] *See, e.g.*, *ABM Treaty Interpretation Dispute: Hearing Before the Subcomm. on Arms Control, International Security and Science of the House Comm. on Foreign Affairs*, 99th Cong., 1st Sess. 21–23 (1985) [hereinafter cited as *Interpretation Dispute Hearing*] (statement of Gerard Smith, former chief, U.S. delegation to the ABM Treaty negotiations); *id.* at 53–55, 58–66, 92 (statement of John Rhinelander, former legal adviser to the ABM Treaty negotiations); *id.* at 106–07 (statement of Rep. Fascell); Rhinelander, *Reagan's "Exotic" Interpretation of the ABM Treaty*, ARMS CONTROL TODAY, Oct. 1985, at 3–6. *See generally* Chayes, *The ABM Treaty and the Strategic Defense Initiative*, 5 PACE L. REV. 735 (1985).

The issue, however, is not whether article V's prohibition is absolute, but rather to which ABM "systems" or "components" the prohibition applies. To answer this question, one must turn to the definition of "ABM system" in article II(1): "For the purpose of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of: (a) ABM interceptor missiles . . . ; (b) ABM launchers . . . ; and (c) ABM radars . . . ."

Proponents of the restrictive view contend that this definition is purely one of function and thus that, for the purposes of the Treaty, an "ABM system" includes anything that could serve the function of countering strategic missiles in flight. According to this theory, the parties to the Treaty listed the three components in article II(1) — missiles, launchers, and radars — merely to identify the elements that an ABM system "currently consist[ed] of," while intending that all future systems satisfying the paragraph's functional definition also be considered "ABM systems" under the Treaty. Only if this premise is correct can one contend that article V bans development, testing, and deployment of all ABM systems or components other than those that are fixed land-based, regardless of whether they rely on physical principles used by the parties in 1972 or on other physical principles.

This reading of article II(1) is plausible, but it has serious shortcomings. The premise that the article II(1) definition was intended to encompass all future systems and components — those based on presently utilized as well as on "other" physical principles — is not necessarily correct. The article II(1) definition can reasonably be read to mean that, for the purposes of the Treaty, an "ABM system" is one that serves the functions described *and* that consists of the type of components that existed "currently" (that is, at the time the Treaty was signed). According to this reading, the parties listed the three components not merely to cite the systems that happened then to be in use, but also to limit the scope of the article II(1) definition to ABM systems based on physical principles then in use. Such a reading is supported by the fact that several provisions of the Treaty consistently use the phrases "ABM system" and "components" in contexts that indicate that the parties were in fact referring to systems and components based on then-utilized physical principles.[9]

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[9] Article II(2), for example, further defines the "ABM system components" listed in article II(1) to include those that are operational, under construction, undergoing testing, undergoing overhaul, repair or conversion, or mothballed — thereby indicating that the article II(1) definition is not merely illustrative, but was intended to describe the actual components covered by the Treaty. Had the negotiators intended to bring future technologies within the purview of article II(1), they could have added "undergoing research" or "developed in the future" to the litany of components in article II(2).

Article II(1) uses the phrase "ABM systems" to describe systems consisting of missiles, The argument for a restrictive reading of article II(1) becomes even weaker when one considers other relevant Treaty provisions. Agreed Statement D, which is the only provision in the Treaty that refers to systems and components based on "other physical principles," explicitly allows the "creation" of such systems and components; it requires that limitations on such systems be stipulated only *after* creation of the systems. In that provision, the parties felt a need to qualify the term "systems and components created in the future" with the phrase "based on other physical principles." If "ABM system" and "components" as used in article II(1) actually meant all systems or devices that could serve ABM functions, whether based on then-utilized or on other physical principles, the parties would not have needed to qualify these terms in Agreed Statement D. The addition of this qualification suggests that the article II(1) definition extends only to those systems or components based on then-utilized physical principles, not to those based on other physical principles, and which Agreed Statement D defines as being "capable of substituting for" ABM missles, launchers, and radars. Thus, the existence of Agreed Statement D poses a fundamental problem for the restrictive view.

Those who argue for the restrictive view counter by contending that Agreed Statement D allows the creation of systems and components derived from "other physical principles" only if such systems and components are fixed land-based. These persons assert that because Agreed Statement D contains a reference to article III, which restricts the deployment of each party's fixed land-based systems, Agreed Statement D applies only to those systems, not to systems that use other basing modes. Nothing in Agreed Statement D, however, states that it applies only to future systems that are fixed land-based. Rather, the statement addresses in general terms all ABM systems and components that are "based on other physical principles."

Moreover, the restrictive interpretation renders Agreed Statement D superfluous insofar as that interpretation implies a ban on the deployment of systems based on future technologies. If article II(1) encompassed all ABM systems and components, both those based on then-utilized technology and those based on other physical principles, then the Treaty — without Agreed Statement D — would ban the

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launchers, and radars, the components of "current" systems. Article IV, which states that the Treaty's general ban on deployment of ABM systems and their components does not apply to those used for testing at stipulated test ranges, specifically limits the number of "launchers" allowed at those ranges. The fact that this article specifically mentions "launchers" as ABM system components reinforces the reading of the article II(1) definition of "systems and components" as limited to systems based on technologies in use when the Treaty was signed. Similarly, article V(2) limits the types of "launchers" that may be developed, tested, or deployed. This language, which appears in the same article as the alleged prohibition on future mobile systems and components, indicates that the Treaty was focused on the types of components listed in article II(1).

deployment of all systems and components, present *and* future, except those particular systems expressly permitted under article III.[10] Agreed Statement D would have been unnecessary for this purpose.[11]

Statements in a Treaty are sometimes written to clarify a point covered by other provisions. But redundancy undermines the viability of a proposed construction — especially when no clarification is needed. A reading that renders a provision redundant or superfluous cannot be said to make a Treaty unambiguous.[12]

Proponents of the restrictive interpretation might respond that redundancy is to be expected in an "Agreed Statement" that appears along with other "Common Understandings." This observation lacks force here, however, because Agreed Statement D — unlike Agreed Statements A, B, and C — does not contain the word "understand." Rather, it is premised on the operative phrase "the Parties agree," which is closer to the language of the Treaty itself ("the Parties undertake"). Similarly, the statement's opening phrase — "[i]n order to insure fulfillment of the obligation not to deploy" — is close to the analogous phrases in article VI ("[t]o enhance assurance of the effectiveness of the limitations") and in articles IX, XII(1), and XIII.[13] In short, the language used in Agreed Statement D indicates that it was written in the form of a substantive obligation, rather than in the form of a mere shared interpretation.

Therefore, while "ABM system" in article II(1) can reasonably be read to mean more than just the particular systems in existence when the Treaty was signed, it cannot readily be construed to encompass future systems or components based on physical principles other than those in use at that time. The phrase is most reasonably read to include, in addition to then-current systems and components, those that could be developed through the application of then-utilized physical principles, but not those systems or components that could be developed only by resort to "other physical principles."

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[10] Article III limits deployment at each party's specified "deployment area" to ABM launchers, interceptor missiles, and radars. *See* ABM Treaty, *supra* note 1, art. III, 23 U.S.T. at 3440, T.I.A.S. No. 7503, at 6.

[11] Indeed, reading the Treaty's definition of ABM systems as encompassing both present and future systems and components essentially would render unnecessary article V's ban on deployment of other than fixed land-based systems. Article III, by specifically limiting the deployment of "ABM systems and their components" to launchers, interceptor missiles and radars at "launch sites," can be read as allowing deployment of only fixed land-based systems; this is how advocates of the restrictive interpretation read article III. But if "ABM systems or their components" encompassed devices based on other physical principles, article III itself would preclude deployment of all such systems based in other than the fixed-land mode.

[12] *See, e.g.*, 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 493, at 222–23 (1943) ("All words of the Treaty are, if reasonably possible, to be given a meaning, and rules of construction may not be resorted to in order to render them meaningless."); 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 33, at 379–83 (1970). The same principle applies to construction of private agreements under domestic law. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (1979) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."); *id.* § 203, comment b ("[I]t is assumed in the first instance that no part of [the agreement] is superfluous.").

[13] Article IX begins: "To assure the viability and effectiveness of this Treaty . . . ." Article XII(1) begins: "For the purpose of providing assurance of compliance with the provisions of this Treaty . . . ." Article XIII(1) begins: "To promote the objectives and implementation of the provisions of this Treaty . . . ."

This latter reading avoids the difficulties of construction created by the restrictive interpretation. Construed more broadly, the Treaty establishes a coherent, nonredundant scheme that: (1) prohibits the deployment of all systems and components based at launch sites and derived from then-utilized physical principles, except in the quantities and areas specifically permitted (article III); (2) prohibits the development, testing, and deployment of all systems and components derived from then-utilized physical principles other than those based at launch sites (article V); (3) permits the creation of systems and components based on other physical principles (Agreed Statement D); and (4) prohibits the deployment of devices based on other physical principles until agreement is reached on specific limitations (Agreed Statement D).

Some opponents of this broader interpretation have objected that, if article II is read not to include systems and components based on other physical principles, then Agreed Statement D fails to prohibit even the deployment of such systems and components. They note that the language of Agreed Statement D contains no clear independent limitation, but refers instead to "the obligation not to deploy ABM systems and their components except as provided in Article III." Therefore, they argue, if article III applies only to systems and components based on current physical principles, then nothing in the Treaty bars deployment of systems and components based on other physical principles.[14]

Although this reading eliminates the redundancy between article III and Agreed Statement D, it does so by depriving Agreed Statement D of any real purpose. Agreed Statement D does, however, have an explicit purpose: "to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III" — that is, to ensure attainment of an objective of article III that article III itself does not bring about. The statement also expressly requires both discussion of "specific limitations" for future systems or components under article XIII and "agreement in accordance with Article XIV of the Treaty" upon the creation of any such system or component.[15] This language implies a general prohibition against deployment of such systems or components as well as a commitment to discuss and to agree on specific limitations (such as those contained in articles III (deployment), IV (testing), and VI (conversion to ABM capabilities)). In the event that agreement cannot be reached, each party retains the power to terminate the Treaty in order to protect "its supreme interests."[16]

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[14] *See ABM Treaty Limitations Relating to the Strategic Defense Initiative: Hearing Before the Subcomm. on Strategic and Theater Nuclear Forces of the Senate Armed Services Comm.*, 99th Cong., 1st Sess. 37–43 (1985) (stenographic transcript) (on file at the Harvard Law School Library).

Thus the broader interpretation of the Treaty not only preserves the integrity of Agreed Statement D, but also is entirely consistent with the Treaty's express and fundamental purpose: to prevent the deployment of devices that could enable one party successfully to defend its territory against the other.

II. THE ABM NEGOTIATING RECORD

Under international law, as under United States domestic law, when an agreement has been found to be ambiguous, an interpreter must seek guidance in the circumstances surrounding the drafting of the agreement.[17] Proponents of the restrictive reading of the ABM Treaty have asserted that the Treaty unambiguously supports their interpretation; therefore, they argue, the Treaty's negotiating record need not be consulted.[18] As the foregoing discussion has demonstrated, however, the broader interpretation of the Treaty is certainly strong enough to warrant consideration of the negotiating record.

The negotiating record of the ABM Treaty — like that of virtually all treaties — is classified. Details of the negotiations therefore cannot be revealed.[19] Nevertheless, many aspects of the Treaty's negotiating history relevant to the present debate have been discussed in public. Some former negotiators have been prominent in discussing the Treaty's meaning and have made various assertions with respect to the agreements that the parties reached. The evidence available from these and other public statements confirms what the record itself persuasively demonstrates: that, while the United States delegates initially sought to ban development and testing of all systems or components based on "other physical principles" (except those allowed by article III), in fact no such agreement was reached.[20]

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[15] *See* ABM Treaty, Agreed Statement D, 23 U.S.T. at 3456, T.I.A.S. No. 7503, at 22, *quoted supra* note 7.

[16] *See* ABM Treaty, *supra* note 2, art. XV(2), 23 U.S.T. at 3446, T.I.A.S. No. 7503, at 12.

[17] *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1980 Gr. Brit. T.S. No. 58 (Cmd. 7964), 8 I.L.M. 679, art. 32; RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 comment b & reporters' note 1 (Tentative Draft No. 6) (1986).

[18] *See, e.g.*, *Interpretation Dispute Hearing*, *supra* note 8, at 53, 58, 92 (statements of Rhinelander).

[19] Nations maintain the confidentiality of Treaty negotiations in order to promote frank exchanges during the course of negotiations and to prevent negotiators from engaging in posturing for the benefit of their publics. As early as the administration of President Washington, the Executive Branch refused to release negotiating records to Congress or the public. *See* A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 85–93 (1976) (discussing President Washington's refusal to communicate to the House of Representatives records of negotiations leading to the Jay Treaty).

At the negotiations, the Soviets stubbornly resisted United States attempts to adopt in the body of the Treaty any limit on systems or components based on future applications of other physical principles — including, explicitly, laser technology. They advanced their arguments against regulating such unknown devices both before and after article V(1) (the provision prohibiting development, testing and deployment of other than fixed land-based ABM systems) was agreed upon in its final form. The Soviets' arguments rested both on their repeatedly expressed unwillingness to deal with unknown devices or technology and on their belief that the parties could not effectively regulate devices that had not yet been created. The furthest the Soviets were willing to go with respect to regulating systems or components based on other physical principles was to adopt a side agreement (Agreed Statement D) prohibiting the deployment of any such systems and components prior to formal discussion between and agreement by the parties on specific limitations. The Soviets never agreed to ban development and testing of systems or components based on other physical principles, regardless of their basing mode.[21]

The negotiating record also contains strong support for a reading of article II(1) that restricts the definition of "ABM system" and "components" to systems and components based on then-utilized physical principles. The Soviets specifically sought to prevent broader definitions of these terms, and the United States negotiators acceded to their wishes. Indeed, the United States negotiators ultimately persuaded the Soviets to adopt Agreed Statement D by explaining that without it, the Treaty would leave the parties free to *deploy* future systems or components based on other physical principles. No former negotiator has denied these details, and Ambassador Paul Nitze, who was present at most of the key discussions, has confirmed them.[22]

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[20] *See Interpretation Dispute Hearing*, *supra* note 8, at 41, 47–48 (statements of Paul Nitze, Special Adviser to the President and to the Secretary of State for Arms Control Matters).

[21] In his book on the SALT I negotiations, Ambassador Gerard Smith repeatedly discusses staunch Soviet opposition to imposing limitations on future systems. *See* G. SMITH, DOUBLETALK: THE STORY OF THE FIRST STRATEGIC ARMS LIMITATION TALKS 265, 343–44 (1980). Smith goes on to assert, however, that the parties ultimately agreed to ban such future systems — without explaining why the Soviets reversed their position. *See id.* As one observer has stated: "[f]or an author who provides an exacting look at the circuitous and arcane channels of the negotiations, Smith is surprisingly silent on why, how, and when the Soviets completely abandoned their previous recalcitrant position and embraced America's." Goldman, *The ABM-SDI Debate: the White House Wins All Draws*, THE NAT'L INTEREST, Spring 1986, at 66, 73.

[22] *See Interpretation Dispute Hearing*, *supra* note 8, at 2–3, 31–32, 37–38 (1985) (statements of Nitze).

Some of the members of the United States delegation that negotiated the ABM Treaty assert that they did in fact achieve a total ban on the development, testing, and deployment of all systems and components other than those that are fixed land-based, including ones based on other physical principles.[23] The negotiating history contains passages that may have led some to draw that conclusion. But the record of the negotiations fails to demonstrate that these negotiators actually succeeded in achieving their objective. On the contrary, although the record demonstrates that the United States negotiators sought to obtain the adoption of language in article V that explicitly would have banned the testing, development, and deployment of all future mobile "devices," it also shows that the Soviet Union rejected the language that the Americans sought. The language that the United States negotiators did succeed in obtaining, banning mobile "systems and components," left the Soviets free to develop and test devices based on other physical principles. The Soviets later agreed in Agreed Statement D to prohibit the deployment of such devices after they were created. Former negotiators who now advocate the restrictive view have stressed that their instructions called for a ban on all future mobile devices — which is uncontested — but have not denied that they failed to obtain the clear language that they sought. Because the Soviets succeeded in blocking a clear prohibition of development and testing of future devices based on other physical principles, the United States has no such commitment either.[24]

III. POST-NEGOTIATION STATEMENTS BY THE UNITED STATES

Proponents of the restrictive interpretation assert, as support for their reading of the Treaty, that the United States has consistently adhered to the restrictive interpretation for the past thirteen years. A careful review of the record, however, demonstrates that this claim is exaggerated.

A. The Period Between Signing and Ratification

Several United States Government statements made in the period between the signing and ratification of the ABM Treaty have addressed the Treaty's application to future systems. A typical example is a statement made in the State Department report submitting the Treaty to the President for transmission to the Senate. In a section entitled "Future ABM Systems," the report explains that:

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[23] *See id.* at 58–59, 71–73 (statement of Rhinelander).

[24] *Cf.* Jordan v. Tashiro, 278 U.S. 123, 127 (1928) ("The principles which should control the diplomatic relations of nations, and the good faith of treaties as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them.").

> A potential problem dealt with by the Treaty is that which would be created if an ABM system were developed in the future which did not consist of interceptor missiles, launchers and radars. The Treaty would not permit the *deployment* of such a system or of components thereof capable of substituting for ABM interceptor missiles, launchers, or radars . . . .[25]

This statement indicates that the Treaty, while prohibiting the *deployment* of future systems, permits their *creation* — in language not specifically restricted to systems that are fixed land-based.

B. The Ratification Process

During the ratification process, various Administration witnesses explained the Treaty's provisions in congressional hearings. When discussing the Treaty's applicability to future systems, these witnesses repeatedly stated, in both written and oral testimony, that the Treaty banned the *deployment* of future systems.[26] They did not mention any ban on development or testing, and some explicitly stated that development of future systems was permitted.[27] A few witnesses did make statements that support the restrictive interpretation,[28] as did some Senators.[29] The testimony of Administration witnesses on the whole, however, was consistent with the broader interpretation.

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[25] *Report of Secretary Rogers*, 67 DEP'T ST. BULL. 3, 6 (1972) (emphasis added); *accord Statements by Dr. Kissinger and Ambassador Smith, Moscow, May 26*, 66 DEP'T ST. BULL. 868, 870 (1972) (statement of Ambassador Gerard Smith, chief negotiator of the ABM Treaty) ("This treaty has as a most significant aspect that it not only limits the present situation but has a choking-off effect on future systems which, under the terms of the treaty as we have reached understandings, will not be *deployable* unless this treaty is amended.") (emphasis added).

[26] *See, e.g.*, *Strategic Arms Limitation Agreements: Hearings Before the Senate Comm. on Foreign Relations*, 92d Cong., 2d Sess. 20 (1972) (remarks of Secretary of State Rogers); *Secretary Rogers Urges Senate Support of the ABM Treaty and Interim Agreement on Strategic Offensive Arms*, 67 DEP'T ST. BULL. 50, 52 (statement of Secretary of State Rogers before the Senate Comm. on Foreign Relations, June 19, 1972); *The SALT Agreements and U.S. National Security*, 67 DEP'T ST. BULL. 147, 148 (statement of Ambassador Smith before the Senate Comm. on Armed Services, June 23, 1972); *Statement by Secretary of State Rogers to the House Foreign Affairs Committee: Agreement on Limitation of Strategic Offensive Weapons, July 20, 1972*, *reprinted in* U.S. ARMS CONTROL AND DISARMAMENT AGENCY, 1972 DOCUMENTS ON DISARMAMENT 488, 492 [hereinafter cited as DOCUMENTS ON DISARMAMENT].

[27] *See Statement by ACDA Director Smith to the House Armed Services Committee: Strategic Arms Limitation Agreements, July 25, 1972*, *reprinted in* 1972 DOCUMENTS ON DISARMAMENT, *supra* note 26, at 518, 522. Another statement of Ambassador Smith is illustrative:

> Senator SMITH. Mr. Ambassador, you say that the treaty prohibits the development of other ABM systems. Would this affect a development of a laser ABM system by the United States?
>
> Mr. SMITH. Senator Smith, one of the agreed understandings says that if ABM technology is created based on different physical principles, an ABM system or component based on them can only be deployed if the treaty is amended.
>
> Work that is direction, development work, research, is not prohibited, but deployment of systems using those new principles . . . would not be permitted unless both parties agree by amending the treaty.

Military Implications of the Treaty on the Limitations of Anti-Ballistic Missile Systems and the Interim Agreement on Limitation of Strategic Offensive Arms: Hearings Before the Senate Comm. on Armed Services, 92d Cong., 2d Sess. 295 (1972) [hereinafter cited as *Armed Services Hearings*].

The House and Senate reports on the Treaty said little about the "future systems" issue.[30] The floor debates were ambiguous; the few statements addressing the question include language supporting both theories.[31]

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[28] For example, Dr. John Foster, Director of Defense Research and Engineering, appeared to read Agreed Statement D as limited to fixed land-based systems. In describing the impact of the Treaty on defense research, he said: "One cannot deploy a fixed land-based laser ABM system which is capable of substituting for an ABM radar, ABM launcher, or ABM interceptor missile. . . . You can develop and test up to the development phase of future ABM system components which are fixed and land based." *Armed Services Hearings*, *supra* note 27, at 275. Similarly, General Palmer, Acting Army Chief of Staff, stated at one point that "[w]e can look at futuristic systems as long as they are fixed and land based." *Id.* at 443. This assertion, however, should be read in light of General Palmer's earlier testimony: "There is no limit or understanding of a limit on R. & D. in the futuristic systems, but [i]t would require an amendment of the treaty or further agreement to deploy such a system." *Id.* at 438.

In response to a written question from Senator Goldwater on June 6, 1972, the Department of Defense submitted a statement that supports the restrictive interpretation, indicating that the parties could engage in development of defensive systems using lasers only if such systems were fixed land-based. *See id.* at 41 ("There are no restrictions on the development of lasers for fixed, land-based ABM systems."). On the other hand, when questioned at a subsequent hearing about the development of a "laser-type ABM system," Defense Secretary Laird stated that:

> [I]t is most important, I believe, that we carry out an adequate research and development program so that we can maintain our ABM technology. The treaty, of course, does make such deployments contingent upon treaty amendment, but it does permit research and development on the ongoing technology which we have in these fields.

Id. at 171.

[29] The following exchange occurred during General Palmer's testimony:

> Senator JACKSON. . . . [U]nder article V of the ABM Treaty "Each Party undertakes not to develop, test or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based."
> Senator GOLDWATER. Fixed based.
> Senator JACKSON. The fixed-base ABM is exempt.
> . . . .
> Senator GOLDWATER. We could then replace the Sentry with the laser if it became effective?
> Senator JACKSON. The prohibition runs to sea based, air based, space based, or mobile land based ABM's.
> Senator GOLDWATER. Not fixed land?
> Senator JACKSON. That's right. That is exempt. . . .
> General PALMER. Let me try to clarify that, Senator JACKSON. The treaty, as you have just read, does limit radars, launchers, and missiles; it does not limit R&D on futuristic systems. We could not deploy such a new system, however.

Id. at 440. Senator Jackson's statement is correct: article V does ban ABM systems other than fixed land-based systems. But he did not state that the article V prohibition applied to future systems based on other physical principles. On the contrary, as General Palmer noted, only the *deployment* of "futuristic" systems was prohibited.

[30] The Senate Report simply reprinted Secretary Rogers' report on the Treaty. The House Foreign Affairs Committee Report stated: "The two nations additionally agree to ban development, testing or deployment of sea-based, air-based, space-based or land-mobile ABM systems. Nor will they deploy ABM systems or components based on new technology without prior discussion and amendment of the treaty." House Foreign Affairs Comm. Report on the Agreement on Limitation of Strategic Offensive Weapons, H.R. Rep. No. 1324, 92d

C. Post-Ratification

Statements made during the post-ratification period have been mixed. Early statements tended to support the broader interpretation; several later ones presented a more restrictive view, some explicitly. At no time, however, was one interpretation universally accepted.

On October 23, 1972, shortly after the Treaty was ratified, Ambassador to the United Nations George Bush presented the following analysis to a committee of the General Assembly:

> A number of important qualitative restraints are also specified [in the Treaty]. For example, the parties have accepted limitations on development and testing. They have agreed not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based . . . . They have also decided not to deploy new ABM systems based on other physical principles, such as those which employ laser beams, for example, without discussion and agreement on their limitation.[32]

This statement, like previous ones by Ambassador Smith and Secretary Rogers, indicates that future systems were treated separately from then-current systems; that Agreed Statement D is not necessarily limited to fixed land-based systems; and that Agreed Statement D is a significant, not a superfluous, part of the Treaty. Two 1973 state-

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Cong., 2d Sess. 3 (1972), *reprinted in* 1972 DOCUMENTS ON DISARMAMENT, *supra* note 26, at 555, 557.

[31] Senator Buckley, for example, opposed the Treaty at least in part because of his reading of its limitations on future technologies. He read article V as applicable to future systems:

> Thus the agreement goes so far as to prohibit the development, test or deployment of sea, air or space based ballistic missile defense systems. This clause, in article V of the ABM treaty, would have the effect, for example, of prohibiting the development and testing of a laser type system based in space which could at least in principle provide an extremely reliable and effective system of defenses against ballistic missiles. The technological possibility has been formally excluded by this agreement.

118 CONG. REC. 26,703 (1972). Similarly, Senator Thurmond felt that "[u]nder the treaty, we also give up the right to deploy any land-based ABM systems of a new type, should they be developed. At the same time we undertake 'not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.'" *Id.* at 26,700 (quoting ABM Treaty, *supra* note 2, art. IV(1), 23 U.S.T. at 3441, T.I.A.S. No. 7503, at 7). Senator Thurmond's comment could be read to indicate that development of future systems, other than fixed land-based systems, was prohibited.

On the other hand, Senator Fong was of the view that the Treaty "[a]llows research and development on ABM systems to continue, but not the deployment of exotic or so-called future systems." *Id.* at 26,707. While "research and development" may not be equivalent to development and testing, Senator Fong's indication that only deployment is banned suggests that he viewed Agreed Statement D as regulating future systems.

[32] *U.S. Discusses Progress and Problems in Arms Control*, 68 DEP'T ST. BULL. 73, 74 (1973).

ments — the annual report of the Arms Control and Disarmament Agency (ACDA) and Secretary Rogers' Foreign Policy Report of April 19, 1973 — treat future systems in much the same way as the Bush statement.[33]

By about 1978, the ABM Treaty's provisions had come to be viewed differently. Several United States Government statements made since 1978 have supported the restrictive theory.[34] Most significantly, the Defense Department's 1985 Report to Congress on the SDI program expressly embraced the restrictive interpretation.[35] On the other hand, the restrictive interpretation has never been uniformly accepted. For example, ACDA's periodic compilation of arms control agreements has consistently supported the broader view of the Treaty. Every edition since SALT I (1975, 1977, 1980, and the most recent edition, in 1982) has provided the following assessment of the ABM Treaty:

> [T]o decrease the pressures of technological change and its unsettling impact on the strategic balance, both sides agree to prohibit development, testing, or deployment of sea-based, air-based, or space-based ABM systems and their components, along with mobile land-based ABM systems. Should future technology bring forth new ABM systems "based on other physical principles" than those employed in current systems, it was agreed that limiting such systems would be discussed, in accordance with the treaty's provisions for consultation and amendment.[36]

Thus, the sole document that tracks the issue over the 1972–82 period consistently suggests that future systems based on other physical principles are regulated only by Agreed Statement D, not by any other provision in the Treaty.

In examining these post-negotiation statements, one must remember that they are unilateral pronouncements. Even if they clearly demonstrated a consistent United States view — which they do not — they cannot bind the Soviet Union to that view. The strongest evidence of what the parties agreed is the Treaty itself, supported by its negotiating record.[37]

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[33] *See* U.S. ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL REPORT: 12TH ANNUAL REPORT TO CONGRESS, *reprinted in* 1972 DOCUMENTS ON DISARMAMENT, *supra* note 26, at 871, 875; U.S. DEP'T OF STATE, UNITED STATES FOREIGN POLICY, 1972: A REPORT OF THE SECRETARY OF STATE (1973), *partially reprinted in* 1973 DOCUMENTS ON DISARMAMENT, *supra* note 26, at 173, 181.

[34] The first such statement appeared in the Fiscal 1979 Arms Control Impact Statement, filed with Congress in 1978. *See* HOUSE COMM. ON INT'L RELATIONS AND SENATE COMM. ON FOREIGN RELATIONS, 95TH CONG., 2D SESS., FISCAL YEAR 1979 ARMS CONTROL IMPACT STATEMENTS 231 (Joint Comm. Print 1978). The Arms Control Impact Statements for fiscal years 1980 to 1986 offer similar assessments of the ABM Treaty.

[35] *See* U.S. DEP'T OF DEFENSE, REPORT TO THE CONGRESS ON THE STRATEGIC DEFENSE INITIATIVE app. § B.1.2 (1985).

[36] U.S. ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS 138 (1982 ed.). For similar statements see the 1975, 1977, and 1980 editions.

IV. CONCLUSION

Based on the Treaty's language and a comprehensive study of the negotiating record, President Reagan has concluded that the broader interpretation of the Treaty is fully justified. Nevertheless, pursuant to presidential directive, the SDI program is continuing to be conducted as originally structured — that is, in a manner consistent with the restrictive interpretation of the Treaty.

The foregoing discussion should make clear that the controversy that has greeted the Administration's interpretation of the ABM Treaty has little to do with the legal justification for that interpretation. Judged on the merits, the broader interpretation is the most reasonable reading of the textual language and is strongly supported by the negotiating record. President Reagan chose not to implement the broader version — but not because the broader version lacks merit. Rather, he did so because it was not necessary to restructure the SDI program towards the boundaries of Treaty interpretation that the United States could lawfully observe. Meanwhile, however, the Soviets are on notice that we are bound by the ABM Treaty only to the extent that they allowed themselves to be bound by its restraints.

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[37] Soviet post-negotiation statements, although unilateral and thus not binding, are also illuminating. Between the time of the signing of the ABM Treaty and the announcement of the SDI program in March 1983, the Soviets issued only one public statement addressing the Treaty's applicability to future systems. Addressing the Presidium on September 29, 1972, Defense Minister Marshal Grechko explained that the Treaty "imposes no limitations on the performance of research and experimental work aimed at resolving the problem of defending the country against nuclear missile attack." Pravda, Sept. 30, 1972, at 1–2 (Foreign Broadcast Service translation). After SDI was announced, the Soviet Union criticized the program on various grounds and called for a new Treaty to ban the use of force in space — but the Soviets did not initially claim that SDI development and testing would violate the ABM Treaty. Not until late 1984 did the Soviets begin to claim that "creation" of an SDI system would violate the Treaty. Even thereafter, Soviet claims vacillated. Only after the United States announcement of its support for the broader interpretation in October 1985 did the Soviet Union begin explicitly to articulate the restrictive interpretation.

THE CAPITAL TIMES
Other Voices
Madison, Wisconsin
Monday, June 1, 1987 — 11

Violating ABM treaty like gorging after diet

By RICHARD B. BILDER

NEWS ITEM: Reagan administration officials are debating whether they should risk violating the 1972 Anti-Ballistic Missile Treaty in order to move ahead with the quick development of a space-based missile defense system.

And now, from another world: In 1972, in a universe parallel to ours without nuclear weapons or anti-ballistic missile systems, President Nixon, concerned about the competitive overeating which was ruining the health of both Americans and Russians, concluded a Discipline in Eating Treaty (DIET) with the Soviet Union.

The DIET, commonly referred to as the Anti-Fat Treaty, provided that, in order to avoid an eating competition between the two countries which could result in each getting much too fat, each would promise to give up high calorie desserts indefinitely. Article V expressly stated that neither country would eat any rich, fattening desserts, "currently consisting of cakes, pies, cookies, puddings and ice cream."

The treaty said that, to guard against "breakout" by the other side, each could continue research on rich desserts. It also provided that Americans and Russians could eat a small agreed amount of fattening desserts, carefully limited in terms of calories, during no more than one week of their vacation.

IT WAS known that some culinary technicians, financed by yuppies, were trying to develop exotic kinds of rich, fattening desserts based on a new technology for making advanced lipo-facilitatory compounds. The two countries had to decide if these exotic desserts were developed, could people also eat them on their vacation? The negotiators, in one of a number of supplementary statements, agreed that if such exotic desserts were in fact developed, they would then discuss the question of eating them on vacation further.

President Nixon submitted the Anti-Fat Treaty to the Senate for its advice and consent, stating that "The DIET would usher in a new era of health for America and the world." During the Senate hearings and debates, some senators asked the president: "You mean this means no desserts, never, ever? Even new exotic kinds of desserts?" The president replied: "Except for vacations, none whatsoever!"

The Senate ratified the treaty with this understanding. For over 12 years, both the U.S. and Soviet Union scrupulously stuck to their DIET, reaffirming on a number of occasions that the Anti-Fat Treaty meant what it said — "No fattening desserts."

IN 1983, President Reagan decided that the U.S. could only prevail over communism by becoming much fatter than the Russians. He proclaimed the Scrumptious Dessert Initiative (SDI) — a massive, multi-trillion-dollar program to develop the richest, most fattening kinds of exotic desserts — desserts more fattening and expensive than humans had ever before dreamed of.

"We have the technology and money to out-eat them, and we're going to do it!" he said. The culinary industry cheered.

But what about the Anti-Fat Treaty? "Well," said the administration, "we've looked at the supplementary statement and at the negotiating history (which unfortunately is secret and can't be publicly revealed), and we've now decided that President Nixon and all of his negotiators were wrong about what it means; under our new reinterpretation, there isn't any agreement to give up new and exotic kinds of rich, fattening desserts! So we can go ahead with the Scrumptious Dessert Initiative!" The administration also said that intelligence reports suggest that Russian clothing factories were secretly gearing up for the production of larger sizes, possibly presaging an imminent Russian "breakout" from the treaty.

"BUT YOU can't do that," howled the Senate. "The DIET clearly is a comprehensive anti-fat treaty prohibiting every kind of fattening dessert, even new kinds; that's what you told us when we gave our advice and consent to ratification. In any case, everyone knows that the text and purpose of a treaty are what control its meaning, not subordinate statements or secret negotiating history; the tail can't wag the dog! If the president doesn't like the treaty, let him just withdraw from it as the treaty expressly permits!"

"Sorry, but a treaty means whatever we say it means," said the administration. "And Americans are beginning to get overinterested in their health and may not like us if they realize we've taken them off their DIET!"

Will the Anti-Fat agreement become a greedy treaty? What will happen to our country's health? Americans will have to look at themselves in the mirror and decide.

Richard B. Bilder is Burrus-Bascom Professor of Law at the University of Wisconsin-Madison and author of "Managing the Risks of International Agreement."

UNIVERSITY OF WISCONSIN LAW SCHOOL
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May 3, 1987

Senators Claiborne Pell and Joseph R. Biden
Committee on Foreign Relations
United States Senate
Washington, D.C. 20510

ATTN: Mr. John Ritch

Dear Senators Pell and Biden:

I have received a letter dated April 15, 1987 from Mr. Geryld Christianson, Staff Director of the Committee, concerning the possibility of my testifying before the Senate Foreign Relations Committee at an upcoming hearing on the Administration's reinterpretation of the ABM Treaty and asking for my views on S. Res. 167 and several other questions.

I would be pleased to appear before the Committee if you think my testimony would be helpful.

My opinion on the questions Mr. Christianson asked is as follows:

1. The Administration's reinterpretation of the ABM Treaty. In my opinion, the Administration's reinterpretation of the ABM Treaty is neither legally correct nor constitutionally appropriate.

I believe that the Administration's interpretation is incorrect as a matter of international law since it is based on an analysis inconsistent with the interpretation which, I believe, would be reached under generally accepted principles of treaty interpretation. In my opinion, a competent and impartial international tribunal, if asked to adjudicate this matter, would decide that the reinterpretation was inconsistent with and possibly constituted an anticipatory breach of U.S. obligations under the ABM Treaty.

I believe that the Administration's interpretation is not appropriate as a matter of U.S. constitutional law since it is inconsistent with the Senate's understanding of the meaning of the treaty at the time it consented to ratification. Consequently, I believe that the reinterpretation raises serious constitutional issues in that it violates the President's constitutional obligation to respect the Senate's constitutional role in the making of treaties.

More broadly, I believe that the Administration's reinterpretation of the ABM Treaty could cause serious damage to our national honor and reputation, impair the credibility of our efforts to ensure Soviet compliance with its treaty commitments, and encourage disrespect by other countries for international law and international obligations.

Consequently, I welcome the Committee's hearings on this important matter and share the hope that the Administration will abandon its reinterpretation and return to the so-called "restrictive" interpretation, which is in my opinion both legally correct and in the long-term interests of our country.

2. The President's obligation to respect the Senate's understanding of a treaty's meaning. With respect to the Committee's questions concerning the respective roles of the President and Senate in the making of Treaties under Article II, Section 2 of the Constitution, and in particular the President's obligation to respect the Senate's understanding of a treaty's meaning, I broadly agree with the excellent analysis presented to the Committee by Professor Henkin on March 11, 1987. In my opinion, the following language from his statement accurately states the law:

> ...The President can only make the treaty to which the Senate consented; he cannot make a treaty other than the one to which the Senate consented. Therefore, the President cannot make a treaty with a text different from the one to which the Senate consented; he cannot make a treaty with a meaning different from the one to which the Senate consented.
>
> ********
>
> ...The President can only make a treaty that means what the Senate understood the treaty to mean when the Senate gave its consent. This is undisputable when the Senate has made its understanding plain in the form of a proposed reservation or explicit understanding. The same principle governs when the Senate's understanding of a treaty provision is not expressed in a formal resolution, but is apparent from the Senate's deliberations leading to its expression of consent. The Senate's understanding of the treaty to which it consents is binding on the President. He can make the treaty only as so understood. He cannot make the treaty and insist that it means something else.

> The principle that the President can only make a treaty as it is understood by the Senate would govern even if the Senate had given no indication of its understanding of the treaty. In that event, it must be assumed--in the absence of any evidence to the contrary--that the Senate understood the treaty to mean what it would be understood to mean by reasonable people, reading the test of the treaty in good faith in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in the light of their object and purpose. That understanding must be assumed to have been the interpretation given to the treaty by the Senate; that interpretation, therefore, is the interpretation which the President must adopt for the United States when he makes the treaty.

****

Consequently, in my opinion, the President must respect the implicit understanding of the Senate concerning a treaty's meaning, even though that understanding is not reduced to a formal condition placed by the Senate on its consent.

3. General principles of treaty interpretation. Since treaties are expressed in words, differences in interpretation are, of course, possible and occur. Thus, a bilateral treaty or particular provisions of a treaty can conceivably be interpreted in good faith as having different meanings from the standpoint of different observers. Such different observers might include, for example: (1) one party, such as the U.S.; (2) the other party, such as the Soviet Union; or (3) a legally competent, responsible and impartial third-party observer or adjudicator.

Ideally, the parties to a treaty will strive, through both thorough and good faith negotiation and careful and precise drafting, to arrive at clearly expressed agreements for which there is only one reasonable meaning or interpretation. To guide this process, and to help in resolving disputes as to interpretation if they should arise, international law provides generally-accepted rules as to treaty interpretation.

The principal rules of interpretation, as set forth in the Vienna Convention of the Law of Treaties (which probably codifies customary international laws), are as follows:

> Article 31
> General Rule of Interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Article 32
Supplementary Means of Interpretation

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
>
> (a) Leaves the meaning ambiguous or obscure; or
>
> (b) Leads to a result which is manifestly absurd or unreasonable.

In my opinion, the international law obligation to perform treaty obligations "in good faith" (Article 26 of the Vienna Convention), implicitly requires the parties to interpret their treaty obligations consistently with the generally-accepted rules of treaty interpretation; in effect, they must consider how a hypothetical impartial third party, applying accepted international law principles of interpretation, would reasonably interpret the treaty. Consequently, as Professor Henkin suggests, absent some clear indication to the contrary, it can be presumed that the U.S. Government, and the Senate in consenting to ratification, interpreted a treaty to which the U.S. is a party in accordance with these generally-accepted principles.

More specifically, these are the general principles which a competent, responsible and impartial third-party adjudicator would presumably apply in interpreting the ABM Treaty; and the principles reasonably to be applied to determining the Senate's presumed understanding of the ABM Treaty for purposes of international or U.S. constitutional or other laws. They are also the principles which the U.S. and the international court would apply in interpreting the treaty for the purpose of determining the Soviet Union's compliance with its obligations under the treaty.

4. The use of negotiating history. With respect to the use of the negotiating record or history (or "preparatory work" as it is called in the Vienna Convention) in treaty interpretation, it is evident from Article 32 of the Vienna Convention that international law accords such preparatory work only a secondary or supplementary role in interpreting a treaty.

This distrust of the use of negotiating history in interpreting formal written agreements mirrors, of course, a similar distrust in many municipal legal systems including our own--for example, our own "parole evidence rule" in contracts and "plain meaning rule" in statutory interpretation. There are a number of reasons why international law places great emphasis on the text and purpose of a treaty and is particularly reluctant to permit the use of negotiating history to vary what could otherwise be reasonably considered the ordinary meaning of the text. These reasons include the fact that many treaties require ratification by legislative or other authorities, which cannot be expected to be aware of the entire negotiating record and history, and that a treaty is likely to continue over long periods to bind subsequent governments, which may also not be aware of all of the negotiating history of the particular treaty.

Thus, it is understandable that international treaty law, as reflected in Article 32 of the Vienna Convention, in general recognizes negotiating history as having interpretive relevance only when there is either a credible ambiguity in the ordinary meaning of the text or where that ordinary meaning arguably produces an absurd result.

To the extent these exceptional conditions of admissibility are present and negotiating history is considered relevant, its weight will, of course, vary with its nature, credibility and content. Obviously, the terms "negotiating history" or "negotiating record" can embrace a variety of things--formal written or oral statements, agreed or unilateral minutes of the negotiations, negotiators' telegrams or reports, subsequent recollections, or informal or casual notes, remarks or letters. Assuming that an impartial tribunal considers negotiating history relevant and admissible to clarify an ambiguity in the text of a treaty, it might reasonably accord considerable weight, for example, to a formally-agreed negotiating minute signed by each country's head of delegation reflecting a particular interpretation, or even to an oral conversation between the two heads of state during a negotiation, witnessed and attested to by the Pope, reflecting their agreement on a particular interpretation. On the other hand, one would expect such a tribunal to give little weight, for example, to an intra-delegation memo by a lower-ranking member of one country's negotiating team, especially if it was relied on to support an interpretation clearly contrary to or inconsistent with that which the text of the treaty or its purpose could indicate.

As I have indicated, in my opinion the text and purpose of the ABM Treaty, reinforced by the parties contemporaneous interpretation of the treaty and by their subsequent interpretation and practice, strongly support the so-called "restrictive interpretation" of the treaty. In the absence of stronger textual support for the Administration's reinterpretation or a more credible argument that the treaty is ambiguous, I am doubtful that a competent and impartial international tribunal, as a matter of international law, would consider negotiating history either relevant or admissible for the purpose of varying the apparent meaning of the treaty.

These principles would apply not only to interpretation by the U.S., but also by the Soviet Union. That is, I would regard any "broad interpretation" of the ABM Treaty by the Soviet

Union, along the lines of the Administration's reinterpretation, as similarly defective and lacking in legal credibility. Consequently, I believe that were the Soviet Union to advance such a "broad interpretation," the U.S. would be justified in making a strong protest that the Soviet interpretation violated the treaty and that the U.S. would have general international support for such a protest.

If, contrary to what I believe, the negotiating record of the ABM Treaty was considered by an international tribunal to be admissible and relevant to interpret the treaty, the weight given to such negotiating history would, as indicated, depend upon its particular nature and content. Certainly, to the extent that such negotiating history appeared to contradict or be inconsistent with the text or apparent purpose of the treaty, the party offering it in evidence would carry a heavy burden of persuasion. Since I am not privy to the negotiating record of the ABM Treaty, I can express no opinion as to its possible credibility or weight.

5. The relevance of the fact that the negotiating record was or was not transmitted. The relevance of the fact that the negotiating record was or was not transmitted to legislative bodies participating in the process of national ratification of a treaty, such as the U.S. Senate, would vary depending on "who" is interpreting the treaty and the purpose of the interpretation.

a. International Law Perspective. As discussed above, from the perspective of a hypothetical or actual impartial international adjudicator, and for the purpose of interpreting the international obligations of a party, negotiating history usually has only a supplementary or secondary relevance, and then usually only when there is an evident ambiguity in the text of the treaty. In general, I do not think it would make much difference in this respect whether the negotiating history was or was not transmitted to the legislative bodies ratifying the treaty. That is, as regards the admissibility or weight of the negotiating record in itself, this would be independent of the fact of transmittal.

However, there might be some situations in which the presence or absence of transmittal might have at least some limited bearing on the interpretation of the treaty for international law purposes. For example, it is conceivable that the transmittal of particular negotiating history could result in a clearly expressed understanding by one party's legislature, known to and arguably acquiesced in by the other party, that an impartial adjudicator would take into account in interpreting the treaty. Again, the fact that one party failed to transmit or communicate particular negotiating history to its ratifying authority might suggest to an impartial adjudicator that that party did not consider the negotiating history as significant or as varying the meaning otherwise reasonably to be given to the text; that is, the lack of communication of a negotiating record might weaken any subsequent claim by a party failing to tell its legislature of that record that the record was in fact of significance as varying the reasonable meaning of the treaty based on its text.

b. U.S. law perspective. For purposes of interpretation of a treaty by the U.S., however, the fact that the negotiating history was or was not transmitted to the Senate has, as indicated, much more potential relevance.

As Professor Henkin pointed out in his testimony, the only treaty that is the supreme law of the land is the treaty made by the President with the consent of the Senate, as understood by the Senate when it gave its consent. The Senate's understanding of the treaty to which it consents is binding on the President. If the Senate, in the absence of transmission of the negotiating record or history, reasonably understands the treaty to mean one thing, the President cannot subsequently invoke an untransmitted, uncommunicated negotiating record to claim that the treaty means something contrary to or inconsistent with the Senate's reasonable understanding. Thus, in my opinion, material drawn from the negotiating history of the ABM Treaty, which was not transmitted or communicated to the Senate and of which it was otherwise unaware, and which may contradict or be inconsistent with explanations of the meaning of the treaty given to the Senate by the Executive Branch at that time, cannot be given interpretive weight in determining the obligations of the U.S. under the treaty as understood by the U.S.

While this may resolve the particular question raised by the Administration's reinterpretation of the ABM Treaty, I think it is important to recognize that there may be situations in which the Senate (unlike the case with the ABM Treaty) does not have any clear or specific understanding concerning the meaning of a particular treaty or particular treaty provision. Can the President, in such cases, rely on negotiating history--even untransmitted negotiating history--to interpret the treaty for purposes of establishing the international obligations of the U.S.?

In my opinion, to the extent that: (1) such negotiating history is arguably relevant under accepted international law principles of treaty interpretation, and (2) assuming that the President's interpretation is not inconsistent with any Senate's understanding, the President can appropriately rely on such negotiating history--even untransmitted negotiating history--to interpret the treaty.

The President, as the sole organ of the U.S. in its international relations, is generally recognized to have authority to determine the interpretation of an international agreement to be asserted by the U.S. in its relations with other states. Except as constrained by a contrary or inconsistent Senate understanding, I see no reason why the President should not be able to rely on such interpretive aids as he may otherwise consider legally appropriate and useful--including even uncommunicated negotiating history--to urge or establish a particular interpretation which he believes is in our national interest.

While I have not had the opportunity to research this question, I suspect that research might show that the U.S. has been involved in a number of treaty disputes with other countries in which the State Department has relied on negotiating history not specifically before the Senate. I would also suspect, however, that in these cases--unlike the dispute concerning the ABM Treaty--the issues involved were ones on which the Senate had no clear understanding one way or the other, or at least not any understanding contrary or inconsistent with the interpretation adopted by the State Department.

c. The other party's perspective. For purposes of interpretation of a treaty by the other party, the fact that the negotiating history was or was not transmitted to the U.S. Senate at the time of its consent to ratification would have, I believe, at most only marginal relevance.

As previously suggested, where transmitted negotiating record led to a particular expressed or apparent Senate understanding, known by and not objected to by the other party, these facts might lend some support to a later argument by the U.S. that the other party had shared or acquiesced in that interpretation. Conversely, a failure to communicate negotiating history to the Senate might be used by the other party to argue that the U.S. placed little weight on that negotiating history as varying a meaning otherwise reasonably given the treaty and understood by the Senate.

In the case of the ABM Treaty, the fact that the negotiating history was not communicated to the Senate would not appear directly to affect the Soviet interpretation of the treaty. However, as indicated, if might conceivably buttress a possible Soviet argument that the negotiating history was not considered by the U.S. negotiators to be of any special significance or as varying the interpretation otherwise presented to and understood by the Senate.

6. The problem of a conflict between U.S. and international law interpretations. This analysis suggests at least one interesting hypothetical problem worth briefly noting.

Suppose the President fails to communicate to the Senate negotiating history which is in fact legally relevant and even controlling for the interpretation of a treaty, resulting in the Senate consenting to ratification with an understanding contrary to the meaning which the U.S. in good faith under international law principles must give the treaty--that is, which an impartial tribunal would probably determine as its meaning?

In this case, in my opinion, the President would nevertheless be bound as a matter of our international law, under the principles explained by Professor Henkin, to the meaning as understood by the Senate. (Conceivably, but I think unpersuasively, it could be argued that the Senate's consent was not "informed consent" and that consequently, the ratification was constitutionally void; however, even in this case, unless the other party knew of the constitutional infirmity, the U.S. would remain legally bound to the treaty as a matter of international law.) In this case, the President would presumably have to take steps to extricate the U.S. from the very awkward position of being internally bound to an interpretation of its international obligations contrary to that required by international law. The President could presumably do this either by seeking to renegotiate or amend the treaty to conform it to the Senate's interpretation; by withdrawing from the treaty according to its terms; or perhaps by resubmitting the treaty to the Senate for renewed consent with the Senate's understanding of the correct interpretation of the treaty under international law.

Even if, as I do not believe to be the case, the Administration's "broad" reinterpretation of the ABM Treaty can credibly be viewed as the "legally correct interpretation" under international law, the Administration, in my opinion, would still be bound by the Senate's "restricted" understanding and would have to take one of the above measures to extricate the U.S. from this awkward situation. For example, the U.S. could presumably withdraw from the treaty as expressly permitted by Article XV.

7. Senate Resolution 167. With the exception noted below, the factual statements and legal conclusions stated in Senate Resolution 167 are, in my judgment, accurate. As indicated above, I agree with the Senate's findings in Section 7 concerning the object and purpose of the ABM Treaty and its declaration in Section 8(2).

I would raise a question, however, as to the accuracy or possible "overbreadth" of Section 8(1), and perhaps, by implication, Section 2(2)(c). As indicated, I believe that there may be situations in which both: (1) a treaty or treaty provision can reasonably be regarded as ambiguous and, under accepted principles of international treaty interpretation, negotiating history, subsequent practice, or other evidence may appropriately be used as supplementary aids to interpretation; and (2) the Senate, consenting to ratification, had no express or implicit understanding, one way or the other, concerning the interpretation of the treaty. As I have explained, I believe that in this situation the President could appropriately under both international law and our own law, draw on even untransmitted negotiating history or other evidence as an aid to interpreting the treaty obligations of the U.S. Indeed, Section 8(1) would appear to permit only resort to the text of the treaty itself, excluding evidence of the treaty's object and purpose or other evidence which may in fact have been before the Senate.

While I do not consider the facts involved in the Administration's reinterpretation of the ABM Treaty as bringing it within this exception, the Senate might wish to consider whether it wishes to use language in the Resolution, such as Section 8(1), which might be capable of being read as purporting to preclude an otherwise appropriate exercise of Presidential constitutional authority in this respect.

More generally, I would be concerned that the Resolution in its breadth might raise its own constitutional questions.

As indicated, it is generally accepted that the President, as the sole organ of the U.S. in its international relations, has at least the principal authority to determine the interpretation of an international agreement to be asserted by the U.S. in its relations with other states. The Senate, to my knowledge, has not ordinarily claimed or asserted a coequal authority to interpret treaties in this regard. However, Sections 7 and 8(2) of the Resolution might be capable of being construed as asserting such a coequal authority.

I have stated my strong agreement with the view that the President's authority to interpret treaties is subject to certain constraints--in particular the constitutional restraint that he cannot interpret a treaty to mean something contrary to or inconsistent with the meaning understood by the Senate in expressing its consent to ratification. Certainly, to the extent that the Senate believes that the President has not in fact interpreted a treaty in accordance with its understanding, the Senate can appropriately remind the President of its understanding and call upon the President to respect it.

However, while the difference may be subtle, it would be important in my opinion that the Senate phrase its resolution or statement in this respect solely in terms of the President's respecting the Senate's understanding at the time of ratification, and not as a wholly independent interpretation of the international obligations of the U.S. My concern is that, to the extent that the Resolution is capable of being read as asserting such an independent interpretation, the U.S. will appear to speak in its international relations with more than "one voice." The Senate may wish to consider whether it intends such a result.

The present situation regarding the President's interpretation of the ABM Treaty is unique in our history. I would respectfully suggest that the Senate might wish to consider expressing its views by a Resolution closely tailored to the particular facts of this unique case. My concern is that the use of broad language in the Resolution--broader than may be necessary to assert the Senate's prerogatives in this matter--might have unknown, unintended and possibly undesired consequences in the future.

Sincerely,

Richard B. Bilder

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Burrus-Bascom
Professor of Law

RBB:smk

INTERPRETATION OF THE ABM TREATY

SENATOR SAM NUNN

May 19, 1987

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PREAMBLE

For the past year and a half, the United States has been embroiled in a contentious and arcane internal dispute over the correct interpretation of those portions of the 1972 ABM Treaty which pertain to the development and testing of futuristic or so-called "exotic" ABM systems. This controversy was precipitated in October, 1985, when the Reagan Administration announced with no advance notice or congressional consultations that the interpretation of the Treaty which successive U.S. administrations had upheld since 1972 was incorrect.

The debate on the reinterpretation issue has necessarily been legalistic. Treaties are, after all, the law of the land, and the President is charged with executing the law. Moreover, the Senate has a crucial constitutional role in treaty-making and thus has a direct interest in ensuring that treaties are accurately presented and faithfully upheld. If the President can unilaterally change treaty obligations which were clearly understood and accepted by the Senate at the time it consented to ratification, it dramatically alters the Senate's constitutional role as a co-equal partner in this area.

For these reasons, it is imperative that the Administration's case for the reinterpretation be subjected to a rigorous legal analysis. Some have accused those who do not accept the

Administration's case for the reinterpretation of allowing "legalisms" to stand in the way of necessary progress in the Strategic Defense Initiative. Others have accused the Administration -- in one columnist's phrase -- of "lookin' fer loopholes" in the Treaty through what might be called "sharp practices."

I believe that it is important to put aside accusations as to motive and judge the facts as they stand. If the reinterpretation is legally correct, then our Nation has every right to proceed accordingly. But if it is not legally correct, then manipulating the law of the land is not acceptable.

Before beginning this legal analysis, there are, however, a few points I want to make about the broader policy context within which this issue must be debated.

First, I do not believe that the reinterpretation debate should be cast in terms of whether one is for or against the ABM Treaty. The Treaty was accepted in 1972 by the Nixon Administration and the United States Senate on the assumption first, that the Soviet Union would strictly observe its terms, and second, that significant reductions in strategic offensive arms would be accomplished within five years.

Neither expectation has been fulfilled. The Soviets have not restrained the relentless expansion of their strategic offensive forces. Their massive investment in strategic defenses (primarily air defenses) -- while not a violation of the ABM Treaty -- does contradict the spirit of the agreement; that is, that both sides recognized and accepted that there can be no shield against retaliation. And violations such as the Krasnoyarsk radar undermine the integrity of the agreement.

In light of these considerations, the Soviet Union must recognize that the U.S. commitment to the ABM Treaty cannot be deemed unalterable or open-ended -- whether or not the traditional interpretation of the Treaty is upheld. If arms control or unilateral strategic modernization efforts (such as moving to mobile ICBMs) fail to restore stability to the strategic balance in the future, the United States may well have to deploy strategic defenses designed to protect its retaliatory forces and command, control and communications. Unless the ABM Treaty could be amended by mutual agreement to permit such deployments, this action would necessarily require the United States to exercise its right under the supreme national interest clause of the Treaty to withdraw on six months notice.

Certainly a U.S. decision to withdraw from the ABM Treaty would be enormously controversial at home and abroad. I am not counselling this course at this time. Nonetheless, the American public and our allies need to understand that if we cannot solve current strategic vulnerabilities through arms control or our own strategic programs, we may have no recourse but to consider deploying some form of strategic defense.

Second, those who support the reinterpretation in the name of accelerating the SDI may be laboring under a fundamental misimpression. There is a strong case that the specific SDI early deployment system now favored by Secretary Weinberger cannot be developed or tested under either interpretation.

Finally, those who would cast this issue as a question of whether one is for or against Soviet violations of arms control agreements miss the point: there are other, more honorable, responses available to the United States. These include, first, insisting that the Soviets correct the violations; second, proportional U.S. responses; and third and last, abrogation of the agreement.

For 200 years, the United States has stood for the rule of law as embodied in our Constitution. The reinterpretation issue must be approached not with an eye toward near-term gains, but rather with a decent respect for the long-term interests of the rule of law and the continued integrity of this Constitution -- that magnificient document whose 200th birthday we celebrate this year.

PART ONE: THE SENATE RATIFICATION PROCEEDINGS

SECTION I: INTRODUCTION

A. Background

In 1972, the United States and the Soviet Union entered into a Treaty on the Limitation of Anti-Ballistic Missile Systems.[1] During the Senate ratification proceedings, Secretary of State Rogers set forth the Nixon Administration's summary perspective on the Treaty:[2]

> Under this treaty, both sides make a commitment not to build a nationwide ABM defense. This is a general undertaking of utmost significance. Without a nationwide ABM defense, there can be no shield against retaliation. Both great nuclear powers have recognized, and in effect have agreed, to maintain mutual deterrence.

In broad outline, the Treaty prohibited deployment of all ABM systems except at two designated sites in each nation. At these sites, the ABM systems were limited to fixed, land-based components based on "then-current" technologies (i.e., ABM missiles, launchers, and radars). Research on these types of ABM components was not limited by the Treaty, but development and testing was confined to agreed test ranges.

The Treaty contained a further prohibition against development, testing, or deployment of sea-based, air-based, space-based, or mobile land-based ABM systems or components. In this report, these types of systems will be referred to collectively as "mobile/space-based" ABM systems. As with fixed, land-based ABM components, research was permitted on mobile/space-based ABM systems. The distinction between fixed, land-based ABMs and mobile/space-based ABMs is a key aspect of the current Treaty reinterpretation controversy.

The Treaty has considerable current relevance because of its direct relationship to the Strategic Defense Initiative (SDI), initiated by President Reagan in 1983. A key element of SDI research involves the potential for a space-based ABM defense using futuristic technology, such as lasers or particle beams. Under current parlance, ABM components using "other physical principles" (i.e., physical principles or technologies "other" than those incorporated into ABMs in 1972) are known as "exotics" (and sometimes referred to as "future systems"). Another key issue in the current reinterpretation controversy involves the impact of the Treaty on development and testing of exotics.

The Reagan Administration initiated the SDI program under what is known as the "traditional" or "restrictive" interpretation of the ABM Treaty (hereinafter referred to as "the Traditional Interpretation"). Under the Traditional Interpretation, the Treaty has the following effect with respect to ABMs using "exotics" such as lasers:

TRADITIONAL INTERPRETATION OF THE TREATY

- research on all ABMs, including those using exotic technologies, is permitted.

- testing and development of fixed, land-based exotics is permitted.

- testing and development of mobile/space-based exotics is prohibited.

- deployment of all exotics (whether fixed, land-based or mobile/space-based) is prohibited unless the parties agree to amend the Treaty.

The Reagan Administration developed an elaborate plan for a "treaty-compliant" SDI research program. This involved conducting SDI experiments and technology demonstrations in a manner which would not transgress the prohibitions under the Traditional Interpretation against the development of full-scale mobile/space-based ABM components or the testing of those components in an ABM mode.

B. Announcement of the Reinterpretation

On October 6, 1985, Robert McFarlane, then the President's National Security Adviser, revealed that the Reagan Administration was preparing to adopt a new interpretation of the Treaty, with dramatic implications for the conduct of SDI. Appearing on Meet The Press, McFarlane announced that ". . . research involving new physical concepts . . . as well as testing, as well as development indeed, are approved and authorized by the treaty. Only deployment is foreclosed . . . ."

McFarlane's announcement of a new reading of the Treaty appeared to open the door to unrestricted development and testing of the actual components of a space-based SDI system utilizing exotic components. It was based on a preliminary legal opinion which had been written the preceding week by Abraham Sofaer, the State Department Legal Adviser.

The main lines of the reinterpretation argument (hereinafter referred to as "the Reinterpretation") may be summarized as follows:[3]

REINTERPRETATION OF THE TREATY

- The text of the Treaty is ambiguous. It prohibits deployment of mobile/space-based ABMs using exotics. Although it is possible to read the Treaty as also banning testing and development of ABMs using exotics, Sofaer maintains that the Treaty "can more reasonably be read to support a broader interpretation" -- i.e., that the Treaty permits such development and testing. [4]

- The record of the Senate ratification debate and other statements at or near the time of ratification supports an interpretation of the Treaty that would permit testing and development of mobile/space based ABMs using exotics. Sofaer contends that this record "can fairly be read to support the so-called broader interpretation."[5]

- The classified negotiating record supports the Reinterpretation, Sofaer contends that the negotiating record demonstrates that "although the United States delegates initially sought to ban development and testing of non-land-based systems or components based on future technology, the Soviets refused to go along, and no such agreement was reached."[6]

McFarlane's announcement, based on the Sofaer analysis, provoked a sharply critical response by Members of Congress, former ABM negotiators, allied leaders, and the Soviet government. Widespread suspicion was voiced from these quarters that the Reinterpretation had been fabricated to advance SDI to the threshold of deployment without amending or abrogating the ABM Treaty.

Although the White House noted the President's agreement with McFarlane's statement, the President decided on October 11, 1985 that the SDI program would continue for the indefinite future to be conformed to the Traditional Interpretation. This decision was formally announced by Secretary Shultz at a meeting of NATO parliamentarians in San Franscico on October 14.

C. Conflicting Administration Views

From the outset, Administration officials provided conflicting views as to the likely duration of the policy of adhering to the Traditional Interpretation. In his October 14 statement, Secretary Shultz declared that switching to the broader interpretation was "a moot point," since the President had reaffirmed that the SDI program "will continue to be conducted in accordance with a restrictive interpretation of the Treaty's obligations." Nonetheless, the Secretary's statement also noted that this policy reflected the Administration's assumption that

SDI would be "consistently funded at the levels required" -- thereby suggesting that were Congress to cut SDI funding significantly, the policy might be reconsidered. However, on October 17, White House spokesman Edward Djerejian declared that congressional funding for SDI "is not a condition for U.S. treaty interpretation."

On October 21, Sofaer told the House Foreign Affairs Committee that the reinterpretation issue "may have practical significance only when the SDI program has reached the point at which questions regarding the feasibility of strategic defense have been answered and engineering development, with a view to deployment, becomes a real option."[7] Sofaer apparently did not believe that this point would be reached at any time during the current administration. In response to a written question submitted by Senator Warner at a November 21 Armed Services Committee hearing, Sofaer commented on the possibility of legislation that would enact the Traditional Interpretation:[8]

> . . .such legislation is unnecessary. The President has affirmed that he intends to pursue the SDI research program as currently structured, which is consistent with the "restrictive" interpretation. Should a future Administration seek to implement the broader interpretation, the Congress would have a voice in that decision. (emphasis added)

Other Administration officials, however, continued to publicly advocate an early switch to the more permissive position. For example, at a December 5, 1985 Armed Services Committee hearing, Richard Perle said, "If you restrict the program to the restrictive interpretation, it would so prejudice the prospect for success that it would become questionable, in my view, whether we should continue with the program at all."[9] However, at the same hearing, the Director of the SDI, Lt. Gen. Abrahamson, testified that it would be "several years" before the Traditional Interpretation would impose any cost or time delay penalties on the program. General Abrahamson explained that by this, he meant "the early 1990 timeframe."[10]

When hearings on the interpretation of the Treaty failed to establish a consensus in the Congress in support of the Reinterpretation, the Senate sought direct access to the negotiating record so that an independent judgment could be made on the issue. The State Department initially refused to provide the record, but relented in August, 1986. Under an arrangement negotiated with Secretary Shultz, all Senators and six cleared staff members have had access to the negotiating record in Room S-407 of the Capitol, a secure facility under the direct control of the Majority and Minority Leaders.

The ABM Treaty interpretation issue is a matter of intense concer to me, both as a member of the Senate and as Chairman of the Armed Services Committee. First, this issue goes to the heart of the Senate's constitutional role in treaty-making. Second, our Committee has jurisdiction over programs of the Department of Defense which are regulated under the Treaty, including SDI.

Over the last several months, I have devoted many hours to study of the Treaty, the ratification debate, and the negotiating record. I have been assisted in this review by Robert Bell, an arms control specialist on the staff of the Armed Services Committee. Mr. Bell has has spent countless hours over the last several months researching these issues. In addition, I have been assisted in my legal analysis by Andrew Effron and Jeffrey Smith, who are both lawyers on the staff of the Armed Services Committee.

In recent weeks, the treaty reinterpretation issue has taken on a new sense of urgency. In the course of a February 3 National Security Council (NSC) meeting, Secretary Weinberger urged President Reagan to make immediate decisions on an early deployment of SDI, including authorizing the Defense Department to restructure SDI in accordance with the Reinterpretation.

D. Commitment to Consultations

News reports of the February 3 discussion provoked deep concern in Congress and allied capitals. On February 6, I wrote the President expressing my concern that a decision to terminate the Administrtaion's policy of observing the Traditional Interpretation without thorough consultations with Congress and our allies would provoke a profound constitutional confrontation. Faced with blunt warnings from allied leaders and other members of Congress, the Administration decided to postpone any imminent decision on this issue and to conduct additional research into such related issues as to what the Senate was told during the 1972 ratification proceedings and how the parties appeared to view the Treaty subsequent to its ratification.

On February 8, Secretary Shultz announced that prior to any final decisions, the Administration would engage in a "collaborative process" of consultations with Congress and our allies. At a February 24 meeting with Senate leaders, Ambassador Nitze and Assistant Secretary Perle provided further assurance that the new Administration studies (which were expected to be finished by the end of April) would be submitted to the Senate and Senators would be afforded an opportunity to review them and consult with the Administration before any final decisions were taken.

On March 9, I received a letter from Judge Sofaer in which he aknowledged that the analyses of the Senate ratification debate which he had previously submitted to the Senate did not cover the subject in full depth. He indicated that the new studies directed by the President would be thorough and comprehensive. I appreciate Judge Sofaer's candor and look forward to reviewing these studies when they are submitted to the Senate.

As a result of these developments, the Senate has both an opportunity and an obligation to make its views known on this issue in the course of the next several months. This report is intended to contribute to this process by examining the merits of the Reinterpretation. Sofaer's case for the Reinterpretation has been offered publicly in various places, including hearings before the Senate Armed Services Committee in 1985 and in the June, 1986 issue of the _Harvard Law Review_.[11] The classified materials provided the Senate last August by the Department of State also include Sofaer's detailed analysis of the negotiating record, as well as brief reviews of the Senate ratification proceedings and subsequent practice.

E. _Definitions_

To recap, the following definitions will be used for purposes of simplicity in this report:

1. _Fixed, land-based_: ABM systems or components which are immobile and are designed for a ground-based mode.

2. _Mobile/space-based_: ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.

3. _Exotics_: ABM systems or components which are: (a) based on "other physical principles" (i.e., physical principles other than those which were incorporated in ABMs at the time the Treaty was signed in 1972); and (b) capable of substituting for 1972-era

ABM systems or components. (i.e., ABM missiles, launchers and radars).

4. Then-current ABM systems or components: ABM systems or components utilzing physical principles which were well known in 1972 -- i.e., ABM missiles, launchers, and radars.

5. The Traditional Interpretation: In its shortest form, the view that the Treaty prohibited the development and testing of mobile/space-based exotics.

6. The Reinterpretation: The view formulated by The current State Department Legal Adviser, Abraham Sofaer, which, in its shortest form, holds that the development and testing of mobile/space-based exotics is permitted under the Treaty.

F. Overview of Report

Section II of Part One summarizes the respective intepretations of the Treaty offered by the Traditional Interpretation and the Reinterpretation. Sections III and IV then examine the 1972 Senate hearings and debate on ratification of the ABM Treaty and the implications for current executive branch conduct of the Senate's understanding when it gave its advice and consent in 1972.

Part Two of this report will focus on the practice of the two parties after 1972 to determine whether this information sheds any useful light on their respective views of the meaning of the Treaty. Part Three will set forth my conclusions with regard to the Treaty negotiating record.

SECTION II: TWO DIFFERENT INTERPRETATIONS OF THE ABM TREATY

The Traditional Interpretation of the ABM Treaty is relatively straightforward: the Treaty expressly prohibits development and testing of mobile/space-based ABMs, and there is no exception for ABMs using exotics. The Reinterpretation is more complex, based upon the interrelationship of various articles in the text. This section summarizes the two theories.

A. The Text of the Treaty

The provisions of the 1972 ABM Treaty that bear on the question of exotic ABM systems and components include Articles II(1), III, IV, V(1), and Agreed Statement "D". The full text of the Treaty is set forth in Appendix 1.

> ARTICLE II(1)
>
> For the purpose of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of:
>
> (a) ABM interceptor missiles, which are interceptor missiles constructed and deployed for an ABM role, or of a type tested in an ABM mode;
>
> (b) ABM launchers, which are launchers constructed and deployed for launching ABM interceptor missiles; and
>
> (c) ABM radars, which are radars constructed and deployed for an ABM role, or of a type tested in an ABM mode.

TRADITIONAL INTERPRETATION: Article II defines the term "ABM system" generically as a system which has the function of countering strategic ballistic missiles. The definition then lists, as an illustration, the components "currently" in use at the time of the agreement. Because the clause listing the components is only illustrative, it does not limit the term "ABM systems" to those containing such components. It also means that the term implicitly covers future systems. Consequently, future ABM systems that might use different components (i.e., exotics) are within the definition.

REINTERPRETATION: Article II is ambiguous, but it can be read more reasonably to limit the definition to those components current at the time of the agreement, thereby excluding ABMs using components other than interceptor missiles, launchers, or radars (e.g., excluding exotic components).

ARTICLE III

> Each Party undertakes not to deploy ABM systems or their components except ... [for two designated fixed, land-based systems with specific limitations on missiles, launchers, and radars].

TRADITIONAL INTERPRETATION: Article III bans deployment of all "ABM systems" or their components except those expressly authorized at two designated sites. By using the term "ABM systems," which is broadly defined in Article II under the traditional view, the prohibition on deployment in Article III extends to all present and future (i.e., exotic) ABM systems and components.

REINTERPRETATION: Applying a narrow definition of ABM systems under Article II, the Reinterpretation then reads the ban on deployment in Article III as applying only to the three then-current components. Under this view, Article III does not establish any barrier to the deployment of exotics.

ARTICLE IV

> The limitations provided for in Article III shall not apply to ABM systems or their components used for development or testing, and located within current or additionally agreed test ranges. Each Party may have no more than a total of fifteen ABM launchers at test ranges.

TRADITIONAL INTERPRETATION: Article IV limits all development and testing of fixed, land-based ABM systems or components to agreed test ranges. Using the traditional view's broad Article II definition of ABM systems, Article IV applies to exotics, as well as then-current, ABM systems, thereby restricting development and testing of exotics to the agreed test ranges. Since the Traditional Interpretation views Article V as banning the development or testing of mobile/space-based exotics (see discussion below), the only exotics which can be developed or tested are fixed, land-based exotics, and these can only be developed or tested at the agreed test ranges.

REINTERPRETATION: Applying a narrow definition of ABM systems under Article II, Article IV only concerns testing and development of then-current components. As a result, the development and testing of exotics (whether fixed, land-based or mobile/space-based) is not restricted to agreed test ranges, and exotics may be developed or tested anywhere.

ARTICLE V(1)

> Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, or mobile land-based.

TRADITIONAL INTERPRETATION: Applying the Traditional Interpretation's broad Article II definition of ABM systems, Article V bans the development, testing, or deployment of all mobile/space-based "ABM systems," including exotics.

REINTERPRETATION: Consistent with the Reinterpretation's narrow reading of the definition of ABM systems, the prohibitions in Article V(1) apply only to ABM systems using "then-current" components. As a result, Article V does not prohibit the development, testing, or deployment of mobile/space-based exotics.

AGREED STATEMENT "D"

> In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems

> and their components would be subject to discussion in accordance with Article XIII [the Standing Consultation Commission] and agreement in accordance with Article XIV of the Treaty [governing amendments].

TRADITIONAL INTERPRETATION: Agreed Statement D complements Article III (which bans deployment of all ABM systems, including exotics, except for fixed, land-based systems expressly exempted at the two specified deployment sites) and Article IV (which permits testing and development of fixed, land-based exotics at agreed test range. Agreed Statement D provides that if such testing and development lends either side to propose deployment of such exotics, the parties should negotiate the limitations which would govern such deployments. If, however, there is no agreement on appropriate amendments to the Treaty, the deployment of exotics remains prohibited.

REINTERPRETATION: Agreed Statement D is ambiguous. The Traditional Interpretation results in a reading of this provision that duplicates other parts of the Treaty (i.e., the ban on deployment of exotics in Article III and the procedure for discussing and agreeing upon amendments in Articles XIII and XIV). To address the ambiguity and give independent meaning to this provision, it should be interpreted in light of the fact that it is the only part of the treaty that expressly mentions exotics. Therefore, Agreed Statement D should be read as banning deployment of all exotics (including fixed, land-based and mobile/space-based) unless the parties agree to amendments permitting such deployment. Moreover, because it only addresses deployment, it should be read as permitting testing and development of all exotics, including mobile/space-based as well as fixed, land-based.

B. Principles of Treaty Interpretation

International law has developed a series of principles for treaty interpretation, the best expression of which is the Vienna Convention on the Law of Treaties.[12] The U.S. has signed the Convention, but has not yet ratified it. The relevant articles are quoted below:

> ARTICLE 31
>
> General Rule of Interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (emphasis added)
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (emphasis added)
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 31 codifies the customary international law principle that a treaty is to be interpreted as a whole and in "light of its object and purpose." Lord McNair, among the most respected scholar in this field, has written:[13]

> Closely connected with the primary duty of seeking to ascertain, and giving effect to, the common intention of the parties is the duty to bear in mind what may be called the overall aim and purpose of the treaty. Thus in the Advisory Opinion upon the Competence of the International Labour Organization to Regulate the Personal Work of Employers, the Permanent Court found no difficulty in holding that inability to make such regulations was 'clearly inconsistent with the aim and the...scope of Part XIII' [of the Treaty of Versailles], and that if any such limitation 'had been intended, it would have been expressed in the Treaty itself.' To the same principle may be related the duty to construe a treaty as a whole and not to focus attention upon any of its provisions in isolation. There is ample evidence of this practice.

Article 31 3(b) also provides that the "subsequent practice in the application of the treaty...shall be taken into account in interpreting the treaty."

This is commonly known as the "practice of states" doctrine and is consistent with the customary international law that preceded the Vienna Convention. Lord McNair has written:[14]

> ...when there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the contracting parties after the conclusion of the treaty... has a high probative value as the intention of the parties at the time of its conclusion. This is both good sense and good law.

Thus, the doctrine of the "practice of states" holds that courts will consider how the parties to the treaty have acted in implementing the agreement. The basic concept is simple, i.e. if there is some ambiguity in the meaning of a provision, but if the parties have conducted themselves consistent with a certain interpretation of that provision, then the courts will give great weight to that conduct as evidence of the meaning of the provision.

The current draft of the American Law Institute's Restatement of the Law is in accord both with respect to interpretation of text and the "practice of states" doctrine:[15]

> Section 325. INTERPRETATION OF INTERNATIONAL AGREEMENTS
>
> (1) An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its objects and purpose.
>
> (2) Any subsequent agreement between the parties regarding the interpretation of the agreement, or subsequent practice between the parties in the application of the agreement is to be taken into account in interpreting the agreement.

In the accompanying comment, the ALI Reporters state that, although the United States has not ratified the Convention, this section "represents what states generally accept and the United States has also appeared willing to accept it."

With respect to recourse to the negotiating history, Article 32 of the Vienna Convention states,

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable. (emphasis added)

Thus, under the Vienna Convention, one does not look to the negotiating history unless the means of interpretation described in Article 31 prove inadequate or lead to a result which is manifestly absurd.

Despite this stricture, courts in the United States and the International Court of Justice have been more willing to review the negotiating record than is suggested by Article 32 of the Convention.[16] The United States Supreme Court, in Nielsen v. Johnson, said:[17]

> "when [a treaty's] meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it."

The comment in the ALI Restatement states that "American courts are more willing than those of many other states to look outside the instrument to determine its meaning in the light of its purpose and the intent of the parties."[18] Thus under the approach taken by either the Vienna Convention or the U.S. courts, it is clear that resort may be had to the negotiating history if other steps fail to reveal the meaning of a particular provisions.

The Traditional Interpretation maintains that the Treaty text is clear on its face. To the extent that other sources of interpretation are consulted, the Traditional Interpretation maintains that they are consistent with the traditional reading of the treaty's text.

Because Sofaer concludes that the Treaty text is ambiguous, he contends that the negotiating record must be examined to determine the meaning of the Treaty. In this regard, the Reinterpretation holds that the negotiating record, which is classified, clearly supports the reinterpretation. The Reinterpretation also considers statements made to the Senate during its ratification proceedings, and concludes that they support the broader view. In other words, the Reinterpretation concludes that the Nixon Administration did not present the Traditional Interpretation to the Senate in 1972. Finally, the Reinterpretation considers U.S. and Soviet post-ratification statements between 1972-1985 and concludes that the record is mixed. The Reinterpretation however, disputes the view that successive U.S. administrations have consistently endorsed the Traditional Interpretation. As previously noted, I shall address each of these assertions in my three reports.

SECTION III: SENATE RATIFICATION PROCEEDINGS

A. Introduction

The ABM Treaty was signed by President Nixon and General Secretary Brezhnev on May 26, 1972. On the same day, the heads of the two negotiating delegations, Ambassadors Smith and Semenov, initialled a separate set of Agreed Statements. This included Agreed Statement D, which addressed the procedure for resolving issues that might arise regarding ABM systems and components using exotics.

Treaty ratification hearings before the Senate Armed Services Committee began on June 6, and the Senate Foreign Relations Committee commenced its proceedings on June 19. In addition, both the House Armed Services Committee and the House Foreign Relations Committee held hearings on the proposed agreements. The Senate, after a lengthy debate on August 3, gave its consent to ratification of the Treaty by a vote of 88-2.

The published records of all of these proceedings, as well as the classified transcripts of the Senate Armed Services Committee and the Foreign Relations Committee hearings, have been examined as part of this study. In view of the Senate's constitutional role in the treaty-making process, my examination focuses on the nine days of hearings held by the Senate Armed Services Committee, the six days of hearings conducted by the Senate Foreign Relations Committee, and the Senate floor debate. The period between May 26 and August 3 has been examined with a view towards identifying three categories of statements:

I. Those which explicitly support the reinterpretation.

II. Those which explicitly support the traditional view.

III. Those which generally address the subject of testing, development, or deployment of exotics but which do not explicitly support either interpretation.

B. Analysis of Statements

The following sets forth the results of this review.

I. The Analysis of the Reinterpretation has not identified a single statement in the record of the ratification proceedings which explicitly supports its case

The Sofaer analysis has not identified, nor did I find, any statements in the record in which any Senator or any Nixon Administration official explicitly stated that development and testing of mobile/space-based exotics was permitted.

II. The record contains a series of authoritative statements explicitly supporting the traditional view that the treaty prohibits testing and development of mobile/space-based exotics

In a series of statements, including authoritative written statements submitted for the record, key administration officials and Senators made it clear that the Treaty's prohibition on testing and development of mobile/space-based ABM systems or components applied to exotics.

a. At the first hearing, the Executive Branch set forth the Traditional Interpretation of the Treaty, expressly discussing the difference between fixed, land-based ABMs and mobile/space-based ABMs in the context of exotics

The question of exotics was raised in the first Senate hearing that considered the Treaty. Senator Goldwater, in a question for the record to Secretary of Defense Laird, noted that he had "long favored" moving ahead with space-based ABMs capable of conducting boost-phase intercepts using "shot, nuces (sic.), or lasers," and asked whether it was correct that nothing in the Treaty "prevents development to proceed in that direction."[19]

The written reply from DoD distinguishes between development of fixed, land-based ABMs (which is permitted by the Treaty) and development of mobile/space-based ABMs (which is prohibited). The reply expressly related these provisions to lasers, an "exotic" ABM component:[20]

REPLY OF SECRETARY LAIRD TO QUESTION FROM SENATOR GOLDWATER

> With reference to development of a boost-phase intercept capability or lasers, there is no specific provision in the ABM Treaty which prohibits development of such systems. There is, however, a prohibition on the development, testing, or deployment of ABM systems which are space-based, as well as sea-based, air-based, or mobile land-based. The U.S. side understands this prohibition not to apply to basic and advanced research and exploratory development of technology which could be associated with such systems, or their components. There are no restrictions on the development of _lasers_ for _fixed, land-based_ ABM systems. The sides have agreed, however, that deployment of such systems which would be capable of substituting for current ABM components, that is, ABM launchers, ABM interceptor missiles, and ABM radars, shall be subject to discussion in accordance with Article XIII (Standing Consultative Commission) and agreement in accordance with Article XIV (amendments to the treaty). (emphasis added)

This statement is particularly significant because it embodies a formal, written Executive Branch response. It clearly sets forth the Traditional Interpretation of the Treaty with respect to exotics, permitting development and testing only in a fixed, land-based mode. The reply makes it clear that mobile/space-based exotics are subject to the comprehensive ban on development, testing, and deployment, with the understanding -- as stated in Secretary Laird's reply -- that the treaty only permits "basic and advanced research and exploratory development."

It is also noteworthy that the reply clearly links the ban on development of mobile/spaced-based ABM laser systems to Article V of the Treaty. Article V contains a comprehensive ban on mobile/space-based, ABM systems. Secretary Laird's express linkage between mobile/space based exotics and Article V directly refutes the Reinterpretation's analysis of the Treaty's text, which asserts that Article V applies only to components existing in 1972 (i.e., missiles, launchers, and radars).

The detailed Executive Branch reply was omitted from an October 30, 1985 analysis of the ratification debate submitted to the Senate Armed Services Committee by Sofaer on November 21, 1985.[21] This omission was brought to the attention of the Committee on January 6, 1986 in a letter from John Rhinelander, the legal adviser to the U.S. SALT I Delegation. In a subsequent analysis of the ratification debate published in the June 1986 Harvard Law Review, Sofaer conceded in a footnote that the DoD reply to Goldwater supports the Traditional Interpretation.[22]

b. An exchange between Senator Henry Jackson and DOD's Director of Research and Engineering confirmed the Treaty's ban on testing and development of mobile/spaced-based exotics

During the Senate debate on the SALT I accords, which included the ABM treaty, the late Senator Henry Jackson, a senior Member of the Armed Services Committee, conducted a rigorous inquiry into the agreements, with a profound impact on the conditions of Senate acceptance. From the outset, he exhibited a keen sensitivity to the issue of exotics by focussing on laser ABMs. For example, just five days after the Treaty's signing, he made a statement sharply critical of the Army's reputed cancellation of a research involving laser ABMs.[23]

When Secretary Laird came before the Committee on June 6, he quickly assured Senator Jackson that no such contract had been cancelled. When Senator Jackson asked about ABM Treaty limits in this area, Secretary Laird gave a general reply -- noting only that "research and development can continue, but certain components and systems are not to be developed" -- without getting into the distinction between fixed, land-based systems and mobile/space-based systems.[24]

Senator Jackson pursued that distinction in a June 22 hearing during testimony by Dr. John Foster, Director of Defense Research and Engineering, and Lt. Gen. Walter Leber, the Program Manager of the Army's Safeguard ABM system. This hearing involved a careful discussion of Treaty's limits regarding development of ABMs using exotics, with a specific focus on the distinction between fixed, land-based systems and mobile/space based systems.

Senator Jackson began by noting that there were limitations in the Treaty on lasers and then asked whether the agreement prohibited "land-based laser development?" (emphasis added)[25]

Dr. Foster replied, "No sir; it does not." The text of the printed hearing reads as follows:

LASER ABM SYSTEM

> Senator Jackson: Article V says each party undertakes not to develop and test or deploy ABM systems or components which are sea based, air based, space based or mobile land based.
>
> Dr. Foster: Yes sir, I understand. We do not have a program to develop a laser ABM system.
>
> Senator Jackson: If it is sea based, air based, spaced based or mobile land based. If it is a fixed, land-based ABM system, it is permitted; am I not correct?
>
> Dr. Foster: That is right.
>
> Senator Jackson. What does this do to our research - I will read it to you: section 1 of article 5 - this is the treaty: "each party undertakes not to develop" - it hits all of these things - "not to develop, test or deploy ABM systems." You can't do anything; you can't develop; you can't test and finally, you can't deploy. It is not "or".
>
> Dr. Foster: One cannot deploy a fixed, land-based laser ABM system which is capable of substituting for an ABM radar, ABM launcher, or ABM interceptor missile.
>
> Senator Jackson: You can't even test; you can't develop.
>
> Dr. Foster: You can develop and test up to the deployment phase of future ABM system components which are fixed and land based. My understanding is that you can develop and test but you cannot deploy. You can use lasers in connection with our present land-based Safeguard system provided that such lasers augment, or are an addendum to, current ABM components. Or, in other words, you could use lasers as an ancillary piece of equipment but not as one of the prime components either as a radar or as an interceptor to destroy the vehicle.

When Senator Jackson suggested that even research on ABM lasers might be prohibited, Dr. Foster said, "No." Interposed between Senator Jackson's question and Dr. Foster's answer is the following insert for the record:[26]

> Article V prohibits the development and testing of ABM systems or components that are sea-based, air-based, space-based, or mobile land-based. Constraints imposed by the phrase "development and testing" would be applicable only to that portion of the "advanced development stage" following laboratory testing, i.e., that stage which is verifiable by national means. Therefore, a prohibition on development --the Russian word is "creation"-- would begin only at the stage where laboratory testing ended on ABM components, on either a prototype or bread-board model.

The importance of this submission as an authoritative statement of Nixon Administration policy is underscored by the original transcript of this hearing (currently maintained in the Armed Services Committee archives), which reveals two key points. First, Dr. Foster pledged to submit the insert after Senator Jackson had declared that "we had better find out" exactly how the Treaty applied to research and development in this area. Second, the transcript reveals that Dr. Foster declared that in order to clarify this issue, the submission would reflect a detailed review of the negotiating record.

The unedited exchange reads as follows:[27]

> Dr. Foster: I think you can engage in research or development of laser land-based ABM systems; you cannot deploy them as a kill mechanism against ICBMs. (emphasis added)
>
> Senator Jackson: Well, that is something we had better find out about it. I would [sic] you would -
>
> Dr. Foster: I would be glad to go through the record, Senator Jackson, in some detail and try to clarify this.

As is the normal practice in editing congressional hearings, the comments about what was to be submitted for the record was deleted and replaced by the actual submission.

Several observations about the extensive exchange between Senator Jackson and Dr. Foster deserve emphasis. First, it includes a formal, written submission, which provided the Executive Branch with an opportunity to prepare an official coordinated statement after review of the negotiating record. As such, it clearly represents an authoritative statement of the Administration's position. Second, the fact that the statement refers to Article V (the Treaty's ban on testing, development, and deployment of mobile/space-based ABMs) in the context of lasers (an "exotic" component) again refutes the Reinterpretation's premise that Article V does not apply to ABMs using exotics.

The Jackson-Foster exchange directly contradicts the Reinterpretation of the Treaty. The credibility of the Sofaer analysis is further undermined by the distorted manner in which it treats this crucial dialogue between a leading Senator and high-level Nixon Administration witness. For example:

(1) The version of this extensive Jackson/Foster exchange presented in Sofaer's October, 1985 analysis of the ratification proceedings and in Sofaer's June, 1986 Harvard Law Review article advocating the reinterpretation is greatly abbreviated. While the Reinterpretation acknowledges that Dr.

Foster's comments support the Traditional Interpretation, the only portion of the entire exchange which it cites is the following:[28]

> Dr. Foster: one cannot deploy a fixed, land-based laser ABM system which is capable of substituting for an ABM radar, ABM launcher, or ABM interceptor missile....You can develop and test up to the development phase of future ABM system components which are fixed and land based.

Foster's explicit confirmation that development and testing of space-based, or mobile land-based laser ABMs was prohibited is omitted in the Reinterpretation. There is also no mention in the Reinterpretation of Foster's written submission nor its linking the discussion of limits on laser ABMs to Article V.

(2) Dr. Foster, a Presidential appointee, was the highest ranking technical official, and third-ranking civilian in the Defense Department. He had served in his position since 1965. Nonetheless, the Reinterpretation tries to disparage his testimony by stating Foster was "not involved in the drafting or negotiation of the Treaty."[29] The suggestion that the Director of Defense Research and Engineering would not have acquainted himself thoroughly with the Treaty's effect on programs under his supervision prior to representing the Administration before the Armed Services Committee is absurd. At any rate, as discussed above, the transcript confirms that Dr. Foster's written submission was based on a detailed review of the negotiating record.

(3) Sofaer's account of the exchange excises Senator Jackson's half of this dialogue in its entirety. As a result, anyone reading this analysis would not know that Senator Jackson had acquired a detailed understanding of the treaty limits in this area or, indeed, that the Senator took the lead in drawing out of the witness explicit confirmation of these restrictions.

(4) As a result of this omission, the *only* mention of Senator Jackson in Sofaer's October, 1985 analysis of *all* of the Armed Services Committee's ratification hearings is in a discussion of a hearing on July 19, which will be considered below. In a summary comment on Senator Jackson's July 19 statements, the Reinterpretation concludes: "Fairly read, Senator Jackson's comments do not address future systems."[30] By omitting the extensive June 22 Jackson/Foster exchange on laser ABMs (as well as other instances when Senator Jackson querried witnesses on the question of laser ABMs, including a highly classified session on June 26 with CIA Director Richard Helms), the Reinterpretation is then able to claim in a paragraph summarizing *all congressional hearings during the ratification proceedings* that "Senator Jackson's comments do not appear to address future systems."[31] Sofaer's assertion that Senator Jackson *never* addressed the question of limits on laser ABMs during the entire Senate debate on the ABM Treaty is flatly contradicted by the record of the debate.

c. In a July 19 exchange with Senator Jackson, General Palmer confirmed that the JCS supported the limitation under which testing and development of exotics was restricted to fixed, land-based systems.

The record of the July 19 hearing before the Armed Services Committee not only repudiates the claim that Senator Jackson did not address future systems, it also contains a crucial passage confirming the Joint Chiefs' understanding of the difference between fixed, land-based and mobile/space-based exotics in terms of the restrictions on development and testing.

This hearing involved an extensive exploration of Treaty's limits on exotics, focussing on laser ABMs. The key exchange occurred between three Senators (Goldwater, Jackson and Dominick), and three Executive Branch witnesses (General Ryan, Chief of Staff of the Air Force, General Palmer, Acting Chief of Staff of the Army, and Lt. Gen. Leber, Project Manager of the Safequard ABM Program.) This exchange covers seven pages of the printed hearing. During this exchange, the word "laser" was used thirteen times, descriptions of or references to lasers were made six other times, and the phrase "futuristic systems" was mentioned three times.

The following discussion, which was initiated by a question from Senator Goldwater as to whether the deployment of laser ABMs was banned, is representative of the dynamic, back-and-forth character of this discussion:[32]

> General Leber: ... The only restriction is that you would not substitute a laser device for one of the components of your ABM system.
>
> Senator Jackson: Would the Senator yield right there?
>
> Senator Goldwater: Yes, sir.
>
> Senator Jackson: Can you tell us how that is going to be monitored?
>
> General Leber: This would be monitored through the commission General Palmer has mentioned, the Joint Commission...
>
> Senator Jackson: Without some sort of onsite inspection, we can't monitor "development," can we?
>
> General Leber: I think we can detect testing of laser devices in an ABM mode; I think we can without onsite inspection.
>
> Senator Jackson: Testing, yes; but development, how are you going to monitor that?

From this colloquy, it is evident that Senator Jackson was concerned about the verifiability of the Treaty limits on the development and testing of laser ABMs, and he demonstrated his mastery of the details in this area by ensuring that the Committee obtained clarifying details from the witnesses. The following exchange, also on the subject of the verifiability of limits on the development and testing of laser ABMs, is illustrative of Senator Jackson's leading role in making it clear that only fixed, land-based exotics were exempt from the prohibition against testing and development:[33]

> Senator Dominick: There isn't any ban, as I understand it, on research and development on either side.
>
> General Ryan: That's right.
>
> Senator Dominick: So, therefore, the on-site inspection is no different; the offsite inspection is no different now than it was before?
>
> Senator Jackson: Yes, but under Article V of the ABM Treaty "Each Party undertakes not to develop, test or deploy ABM systems or components which are sea-based, air-based, space-based or mobile land-based."
>
> Senator Goldwater: Fixed based.
>
> Senator Jackson: The fixed-based ABM is exempt.
>
> Senator Goldwater: Fixed based.
>
> Senator Jackson: The fixed-baseve [sic]
>
> Senator Goldwater: We could then replace the Sentry with the laser if it became effective? (emphasis added)
>
> Senator Jackson: The prohibition runs to sea based, air based, space based, or mobile land based ABMs.
>
> Senator Goldwater: Not fixed land?
>
> Senator Jackson: That's right. That is exempt. I am just pointing this out. In those other areas, it is prohibited and, development is also prohibited. (emphasis added)

This exchange directly refutes the Reinterpretation by demonstrating the understanding of these key Senators as to the difference between permissible testing and development of fixed, land-based exotics and prohibited testing and development of mobile/space-based exotics.

During the same hearing, Senator Jackson also questioned the witness about General Palmer's broad statement that the treaty "does not limit R&D on futuristic systems."[34] Senator Jackson, expressing concern about the generality of this response, drew the witnesses' attention to Article V's prohibition on development of mobile ABM systems. General Ryan noted the distinction between permissible development of fixed, land-based systems and the prohibited development of mobile/space-based systems. Finally, General Palmer provided an authoritative statement on the prohibition on development of mobile/space-based exotics:[35]

> General Palmer. I would like to come back to the question.
>
> Senator Jackson: You are here in a professional capacity and we need your professional judgement.
>
> General Palmer. On the question of the ABM, the facts are that when the negotiation started the only system actually under development, in any meaningful sense, was a fixed, land-based system. As the negotiations progressed and the position of each side became clear and each understood the other's objectives better, it came down to the point where to have agreement it appeared that --this is on the anti-ballistic missile side-- this had to be confined to the fixed, land-based system. The Chiefs were consulted. I would have to go to a closed session to state precisely the place and time. They were consulted on the question of qualitative limits on the AB (sic) side and agreed to the limits that you see in this treaty.
>
> Senator Jackson. Even though it cannot be monitored?
>
> General Palmer. Yes.
>
> Senator Jackson. I just wanted that; so the Chiefs went along with the concept here that involved --
>
> General Palmer. A concept that does not prohibit the development in the fixed, land-based ABM system. We can look at futuristic systems as long as they are fixed and land based.
>
> Senator Jackson. I understand.
>
> General Palmer. The Chiefs were aware of that and had agreed to that and that was a fundamental part of the final agreement. (emphasis added)

Sofaer's analysis of this discussion omits Palmer's crucial closing comment that the JCS were aware of the limits on development and testing of laser ABMs, had agreed to them, and recognized that this was "a fundamental part of the final agreement." Thus, the record demonstrates that Sofaer's assertion that Senator Jackson did not address the question of exotics during the ratification debate is a complete and total misrepresentation. It also underscores the inadequacy of its analysis by its omission of this additional, and authoritative, confirmation that the Treaty banned the development and testing of all but fixed, land-based exotics.

It is also noteworthy that Senator Jackson and the Executive Branch witnesses clearly cited the prohibition on testing and development of mobile/space-based systems in Article V of the treaty as the authority for the prohibition on testing and development of missile/space based ABM using exotics. This further undermines the Reinterpretation's analysis of the Treaty's text in which it asserts that Article V should not be read as applying to mobile/space-based exotics.

d. Opposition to the treaty was based on the prohibition against testing and development of mobile exotics -- a limitation commonly understood by both proponents and opponents of the treaty.

On June 29, Senator James Buckley testified before the Foreign Relations Committee. By that time, he had emerged as a vocal critic of the ABM Treaty and was later one of only two Senators who voted against it. During his testimony, Senator Buckley was questioned by Senator Fulbright, Chairman of the committee, Senator Sparkman, who managed the Treaty debate on the Senate floor, and Senator Cooper, who had played one of the leading roles in the ABM deployment debate in the late 1960s.

Senator Buckley opposed the Treaty primarily because it prohibited the development, testing, and deployment of space-based ABMs using exotics:[36]

> Thus the agreement goes so far as to prohibit the development, test or deployment of sea, air or space-based ballistic missile defense systems. This clause, in Article V of the ABM Treaty, would have the effect, for example of prohibiting the development and testing of a laser-type system based in space which could at least in principle provide an extremely reliable and effective system of defenses against ballistic missiles. The technological possibility has been formally excluded by this agreement. There is no law of nature that I know of that makes it impossible to create defense systems that would make the prevailing theories obsolete. Why, then, should we by treaty deny ourselves the kind of development that could possibly create a reliable technique for the defense of civilians against ballistic missile attack? (emphasis added)

In response to a question by Senator Sparkman, Senator Buckley made it clear that he was opposed to the Treaty not because it prohibited an ABM defense using *then-current* systems, but rather because it prohibited the development of *new* space-based ABM systems:[37]

> Senator Sparkman: Senator Buckley, I think you make your position clear. Now, as I understand it, you do not agree with the President in his viewpoint on this, nor the Joint Chiefs of Staff?
>
> Senator Buckley: ... Where I am in disagreement ... is the philosophy of a mutual deterrence ... Now on the basis of existing technology, I can see the reasoning for this, although there is a question about the effectiveness of available ABM technology; but I do question the morality of deciding now for all time that we will preclude ourselves from developing new concepts which at a later date could mean that the city of Washington or New York or San Francisco or Detroit could not be meaningfully protected ...

The record of the hearing indicates that these three senior members of the committee of principal jurisdiction over the Treaty well-understood the basis for Senator Buckley's opposition. Indeed, Senator Cooper, while not agreeing with Senator Buckley's opposition to the Treaty, praised the witness for his testimony, saying:[38]

> I would like to say I think that Senator Buckley has performed a useful service here today. You have raised practically every question I think that might have been considered by the negotiators. Your paper shows the very thorough knowledge you have of the negotiations and of the systems. Your questions are very valuable because the questions you raised, in their technical application at least, are correct.

On August 3, during debate on the treaty on the floor of the Senate, Senator Buckley repeated the main themes he voiced during his appearance before the Foreign Relations Committee, including the following principal criticism of the Treaty:[39]

> Thus the agreement goes so far as to prohibit the development, test or deployment of sea, air or space based ballistic missile defense systems. This clause, in Article V of the ABM treaty, would have the effect, for example, of prohibiting the development and testing of a laser type system based in space which could at least in principle provide an extremely reliable and effective system of defenses against ballistic missiles. The technological possibility has been formally excluded by this agreement.

Senator Buckley's testimony before the Senate Foreign Relations Committee clearly confirms the meaning of the treaty as presented to the Senate by the Executive Branch. Despite the clear, unrebutted impact of this testimony, it is omitted completely from the Reinterpretation's November 1985 analysis and Sofaer's 1986 Harvard Law Review article. The Reinterpretation cites Buckley's floor speech, but denigrates its significance by raising "the possibility that opponents of the treaty may have tried to exaggerate its limitations."[40] In view of the consistency between Buckley's statement and the Executive Branch's presentation of the treaty, this assertion is without merit.

The Senate's understanding of the treaty is underscored in the following remarks by Senator Thurmond, delivered on the floor of the Senate just prior to the vote on the treaty:[41]

> Under the treaty, we also give up the right to deploy any land-based systems of a new type...At the same time we undertake "not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based." (emphasis added)

The Reinterpretation acknowledges that "Thurmond's comment could be read to indicate development of future systems, other than land-based, was prohibited."[42]

III. The record contains various general statements on the development, testing or deployment of exotics, without reference to their basing mode. Because these statements do not distinguish between fixed, land-based systems and mobile/space-based systems, they carry little probative value either way with respect to the correct interpretation.

The record of the ratification proceedings contains a number of other statements which touched on the subject of exotics. Most of these involved a general statement by a Senator or an administration official to the effect that under the Treaty, future ABM systems based on other physical principles could not be deployed. Other statements involved general remarks that "R&D" on lasers was permitted, but without any specifity as to basing mode (i.e, whether fixed, land-based or mobile/space-based).

As previously noted, the Reinterpretation does not cite a single statement in the record of the Senate ratification proceedings in which a Senator or Executive Branch official explicitly states that development and testing of mobile/space-based exotics is permitted under the Treaty. Consequently, the reinterpretation's claim that this record can be read to support the reinterpretation rests on statements which it infers as supportive of this view. All of these statements fall into one or the other of the two following categories.

a. General Statements Concerning the Ban on Deployment

In the Reinterpretation, much is made of brief statements to the effect that the deployment of exotics is banned. For example, during his May 26, 1972 press conference, Ambassador Smith said, "future systems ... will not be deployable unless this treaty is amended."[43] The Reinterpretation reads this statement as supportive of its case, arguing that "It is unlikely that Ambassador Smith, the negotiator of the Treaty, would have referred to only a ban on deployment if he had meant testing and development were banned as well."[44]

Smith's statement that the deployment of exotics is banned is, however, fully consistent with the Traditional Interpretation. Nonetheless, the Reinterpretation suggests that since Smith cited the ban on deployment of exotics but omitted any mention of a ban on their development or testing, then he must have believed that the Treaty gave a "green light" to such activities; that is, that he would have gone on to say, had he voiced his opinion on this issue, that the Treaty permits the development and deployment of all exotics.

In short, the Reinterpretation presumes that if Smith had believed that the Traditional Interpretation had been agreed to he would not have said simply that "future systems ... will not be deployable unless this treaty is amended" -- he would have said that "future systems will not de developed, tested, or deployed unless this treaty is amended."

There are three major problems with the logic upon which this analysis is based. First, the Smith statement is true and accurate on its face because under either interpretation deployment of future systems (i.e., exotics) is banned. Second, it attempts to build a major case on what was not said. Third, if Smith had said what the Reinterpretation postulates he should have said, he would have been wrong. Why? Because under both the Traditional Interpretation and the Reinterpretation, the development and testing of fixed, land-based exotics is permitted. Development or testing of mobile/space-based exotics is, of course, banned under the Traditional Interpretation.

Under the logic of the Reinterpretation, to prevent his remarks from being distorted in the future and, at the same time, ensure accuracy, Smith would have had been compelled to turn his brief sentence into something resembling the following:

> Future systems (i.e., exotics) -- whether fixed, land-based or mobile/space-based -- will not be deployable unless the treaty is amended. Future fixed, land-based exotics may be developed and tested, but only at the agreed test ranges as established under Article IV. Future mobile/space-based exotics may not be developed or tested at all in accordance with Article V.

In summary, the assertion by the Reinterpretation that a speaker's belief may be inferred from words he did not utter is illogical. The fact that the Reinterpretation's conclusions as to the Senate ratification debate rely so heavily upon such statements reveals the flimsiness of its case.

In addition to Smith's May 26 statements, the following statements fall into the category of general remarks concerning the ban on deployment:

(1) A section in Secretary of State Rogers' June 10 letter of transmittal, subheaded "Future ABM Systems", which included the following sentences:[45]

> A potential problem dealt with by the Treaty is that which would be created if an ABM system were developed in the future which did not consist of interceptor missiles, launchers and radars. The Treaty would not permit the deployment of such a system or of components thereof capable of substituting for ABM interceptor missiles, launchers or radars.

The Reinterpretation postulates that Rogers should have said that the development and testing of exotics was banned if he believed the Traditional Interpretation had been achieved. This overlooks the fact that Rogers could not accurately have said this

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if he believed the more restrictive position had been achieved, since it would have been incorrect as it applies to fixed, land-based exotics. Neither did Rogers say that the development and testing of exotics was permitted. Had he said this, it would in fact support the Reinterpretation, but he did not. The fact that Rogers elected not to provide a detailed elaboration of the limits on development and testing as it applied to fixed, land-based versus mobile/space-based exotics does not support the Reinterpretation.

(2) Two statements by Secretary Rogers to the Foreign Relations Committee on June 19 which indicated that future "exotic" types of ABMs, such as lasers, could not be deployed.[46] The Reinterpretation postulates that Rogers should have said that the development and testing of exotics was banned if he believed the Traditional Interpretation had been achieved. This overlooks the fact that Rogers could not accurately have said this if he believed the more restrictive position had been achieved, since it would have been incorrect as it applies to fixed, land-based exotics. Neither did Rogers say that the development and testing of exotics was permitted. Had he said this, it would in fact support the Reinterpretation, but he did not. The fact that Rogers elected not to provide a detailed elaboration of the limits on development and testing as it applied to fixed, land-based versus mobile/space-based exotics does not support the Reinterpretation.

(3) A similar comment by Ambassador Smith at the same hearing.[47] The Reinterpretation postulates that Smith should have said that the development and testing of exotics was banned if he believed the Traditional Interpretation had been achieved. This overlooks the fact that Smith could not accurately have said this if he believed the more restrictive position had been achieved, since it would have been incorrect as it applies to fixed, land-based exotics. Neither did Smith say that the development and testing of exotics was permitted. Had he said this, it would in fact support the Reinterpretation, but he did not. The fact that Smith elected not to provide a detailed elaboration of the limits on development and testing as it applied to fixed, land-based versus mobile/space-based exotics does not support the Reinterpretation.

(4) A June 28 prepared statement by Ambassador Smith during an Armed Services Committee hearing that no exotics could be deployed unless the treaty was amended.[48] The Reinterpretation postulates that Smith should have said that the development and testing of exotics was banned if he believed the Traditional Interpretation had been achieved. This overlooks the fact that Smith could not accurately have said this if he believed the more restrictive position had been achieved, since it would have been incorrect as it applies to fixed, land-based exotics. Neither did Smith say that the development and testing of exotics was permitted. Had he said this, it would in fact support the Reinterpretation, but he did not. The fact that Smith elected not

to provide a detailed elaboration of the limits on development and testing as it applied to fixed, land-based versus mobile/space-based exotics does not support the Reinterpretation.

b. General statements concerning research and development of exotics

The Reinterpretation also points to a number of statements in which a witness or Senator states that lasers could be developed under the Treaty -- without differentiating between fixed, land-based and mobile/space-based systems. Under both interpretations, such statements are correct as applied to fixed, land-based laser ABMs. In addressing these statements, it is important to recognize that at the time of the 1972 ratification debate, the only U.S. R&D program of any significance in the area of laser ABMs was a fixed, land-based system. As previously noted, the Nixon Administration had been stung by Senator Jackson's charge in early June that an Army laser ABM contract had been cancelled due to the Treaty. Thus, it is not surprising that executive branch officials would have sought to assure the Senate by making broad statements that R&D on laser ABMs could continue.

The following statements -- all of which are cited by the Reinterpretation in support of its case -- fall into this category:

(1) A June 20 reply by Secretary Laird to a question by Senator Thurmond:[49]

> Senator Thurmond: I understand we have had R&D programs, such as the development of the laser-type ABM system. Is there a good reason why we should forever preclude the possibility of developing a truly effective defense of our cities if our technology should make one available?
>
> Secretary Laird: ... The Treaty, of course, does make such deployments contingent upon treaty amendment, but it does permit research and development on the ongoing technology which we have in these fields.

(2) A June 22 exchange between Dr. Foster and Senator Smith:[50]

> Senator Smith: In other words, the laser, if it was developed to the ultimate, could not be used at one of the two sites.
>
> Dr. Foster: Yes, its deployment would be prohibited by the Treaty. ...
>
> Senator Smith: But that will not slow us up or slow us down on continued research and development of the laser, will it?
>
> Dr. Foster: No, Senator, it will not.

(3) A statement by Ambassador Smith to Senator Smith at the same hearing that development but not deployment of ABM systems based on "different physical principles" was permitted. This statement made no mention of whether this was affected by the basing mode.[51]

(4) A statement by Ambassador Smith to Senator Goldwater at the same hearing that neither side would be precluded from the development of the laser as an ABM.[52]

(5) A statement by Senator Fong during his August 3 floor speech which noted generally that research and development of "exotics" could be continued. [53]

Conclusions

The record clearly demonstrates that the key figures in the Senate debate -- Senators Jackson, Buckley, Goldwater, Thurmond, Cooper and Sparkman -- understood that the development, testing and deployment of space-based "exotics" was not permitted under the treaty.

Moreover, there was clearly a perception within the Senate that the ratification hearings had served a crucial function in clarifying the Treaty's terms. Senator Jackson commented on this during his final speech on the Treaty just prior to the vote. After noting the extensive hearings in the Armed Services Committee and the "literally hundreds" of questions he had asked, Senator Jackson said:[54]

> Several things emerged from this effort, not least of all some important clarification by administration spokesmen of various provisions of the agreements. Some of these provisions had been interpreted in several different ways depending on the witness commenting upon them. I believe the hearings were helpful both in clarifying the obligations we have undertaken and in understanding the implications for our future security of the many limitations to which we and the Soviets have agreed. ... Many Senators will recall the early confusion that surrounded the first announcements of the agreements. ... I hope that as we begin our consideration of the agreements the terms of them are at last firmly in mind.

In this regard, it is noteworthy that with the exception of Senator Fong's floor statement, all of the general statements on deployment and R&D occurred early in the ratification proceedings (i.e., in June), well before the extensive exploration of Treaty limits on lasers which took place during the July 19 Armed Services Committee hearing (and before Senator Buckley's June 29 testimony before the Foreign Relations Committee).

Finally, the prohibition on testing and development of exotics was squarely presented to the Senate by the Executive Branch, and that policy choice (but not the treaty interpretation) was vigorously challenged by Senator Buckley. At no point during the proceedings did any Executive Branch witness or Senator say "no, that interpretation is wrong, the treaty does not prohibit such testing." Indeed, during the pointed discussions of exotics involving the distinction between fixed, land-based ABMs and mobile ABMs, not one witness or Senator ever stated that deployment and testing of mobile/space-based exotics was permitted.

The record of the ratification proceedings supports the following conclusions about the scope of the Treaty.

- Executive Branch witnesses clearly stated that development and testing of mobile/space-based exotics was banned, while development and testing of fixed, land-based exotics was permitted.

- Key members of the Senate (including Senators Henry Jackson, Barry Goldwater, John Sparkman, and James Buckley) were directly involved in the dialogue and debate concerning the implications of the treaty, which the record indicates they clearly understood to ban testing and development of mobile/space-based exotics.

- The Reinterpretation is based on two categories of incomplete, imprecise, or general statements: those which indicate that exotics cannot be deployed and those which indicate that R&D on lasers is permitted. However, each of these statements can be read as consistent with either the Traditional Interpretation or the Reinterpretation. Furthermore, all but one of these occurred early in the proceedings before clarifications were brought out in the course of detailed questioning in the Armed Services Committee.

- The record of the Senate proceedings does not support the Reinterpretation's claim that the record of the Senate ratification proceedings on the ABM Treaty and statements made at or near the the ratification period "can fairly be read to support the so-called broader interpretation."[55] On the contrary, the record of these proceedings makes a compelling case for the opposite conclusion: that the Senate was presented with a treaty that prohibited testing or development of mobile/space-based exotics; both the proponents and opponents of the treaty understood the agreement to have this effect; and there was no challenge to this understanding in the course of the Senate's approval of the treaty.

In summary, this report has examined the Reinterpretation's analysis of the Senate ratification proceedings and found its conclusions with respect to this record not to be credible. I have concluded that the Nixon Administration presented the Senate with the Traditional Interpretation of the Treaty's limits on mobile/space-based exotics and the Senate clearly understood this to be the case at the time it gave its advice and consent to the ratification of the Treaty. In my judgement, this conclusion is compelling beyond a reasonable doubt.

This finding does not address all issues raised by the Reinterpretation. In the next two parts of this Report, I will examine the issues of subsequent practice and the negotiating record, and any final judgements must incorporate those assessments. Nontheless, the finding that the Senate approved the ABM Treaty on the basis of its clear understanding and acceptance of the traditional interpretation has serious ramifications for executive branch conduct. These implications will be addressed in the following section.

SECTION IV: IMPLICATIONS FOR EXECUTIVE BRANCH CONDUCT

A. The novel attempt to dismiss the significance of statements during ratification proceedings ignores basic principles of treaty interpretation

In recent weeks, the State Department has raised a new theory, apparently pleading its case in the alternative. State has argued that regardless of whether the ratification proceedings support the the Reinterpretation, Executive Branch testimony presented to the Senate during the treaty-making process can be disregarded. For example, on the David Brinkley show (February 8, 1987) Secretary Schultz said that such testimony "has absolutely no standing" with the Soviets. In my opinion, this argument is incorrect in the context of the ABM Treaty, and is squarely in conflict with the constitutional role of the Senate.

Recent Soviet statements indicate that they now consider themselves bound by the Traditional Interpretation. For example, in an October 19, 1985 article in Pravda, Marshall Sergei Akhromeyev, the Chief of the Soviet General Staff, stated: "Article V of the Treaty absolutely unambiguously bans the development, testing, and deployment of ABM systems or components of space or mobile ground basing, and, moreover, regardless of whether these systems are based on existing or 'future' technologies."[56] The Reagan Administration has not argued that the Soviets do not now claim to be bound by the Traditional Interpretation. Rather, the administration's position -- as stated by Sofaer -- is that "Only after the United States announcement of its support for the broader interpretation in October 1985 did the Soviet Union begin explicitly to articulate the restrictive interpretation.[57]

In this context, the State Department's suggestion that statements made by U.S. officials during ratification proceedings have no standing with the Soviets is a moot point. Let us assume, however, that the Soviets asserted that U.S. statements during the ratification proceedings had "no standing" with them. Would the U.S. have any basis in international law for relying on the statements to the Senate?

As a matter of international law, the actions of the parties, including their statements, provides an important guide to the meaning of a Treaty. As Lord McNair notes in his classic treatise, The Law of Treaties, "when there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the parties after conclusion of the treaty (sometimes called the 'practical construction') has a high probative value as to the intention of the parties at the time of its conclusion."[58]

McNair also states that "when one party in some public document such as a statute adopts a particular meaning, circumstances can arise, particularly after the lapse of time without any protest from the other party, in which that evidence will influence a tribunal."[59] Furthermore, "[w]hen one party to a treaty discovers that other parties to a treaty are placing upon it an interpretation which in the opinion of the former it cannot bear, and it is not practicable to secure agreement upon the matter, the former party should at once notify its dissent to the other parties and publish a reasoned explanation of the interpretation which it places upon the term in dispute."[60] This is similar to the proposition under U.S. domestic law, that "if one party knows or has reason to know that the other party interprets language in a particular way, his failure to speak will bind him to the other party's understanding."[61] Although not necessarily binding as a matter of international law, the failure to object to a publicly announced interpretation by another party to a treaty is clearly relevant to the treaty's meaning.[62]

In the case of the ABM Treaty, these principles take on even greater significance in view of attendance by Soviet officials at the Senate hearings on the agreement. Indeed, Senators Goldwater and Jackson noted the presence of one such Soviet official -- who was apparently a regular attendee -- during an extensive discussion with Nixon Administration officials during a July 19 Armed Services Committee hearing that dealt at length and in great detail with the specific question of the Treaty's limitations in the area of laser ABMs.[63] Even if the presence of Soviet observers had not been noted for the record -- which it was -- it is obvious that the Soviets, who understand how our treaty-making process works, monitored the proceedings and reviewed the public records. Based on their clear awareness of the interpretation being presented to the Senate, if the Soviets chose to enter the Treaty into force without raising an objection, the U.S. would have had a very strong basis in law for insisting on the original meaning as presented to the Senate -- particularly if the Soviets waited until 15 years later to undertake a different view of the treaty.

Aside from the immediate issue of the ABM Treaty, it is contrary to the long-term interests of the United States to assert that statements made to the Senate have no standing with other parties to a treaty. The international community is well-aware of the constitutional role of the Senate in the treaty-making process, and they are on notice that the executive branch explains treaties to the Senate during the ratification proceedings. It is to our national advantage to ensure that such authoritative explanations remain available as powerful evidence of a treaty's meaning in the event of an interpretative dispute among nations.

B. By asserting that executive branch assurances to the Senate may be disregarded, the proposed reinterpretation has raised a direct constitutional confrontation with the Congress

By asserting that the Executive Branch may now disregard the views of those who spoke for the Administration and those who debated the issue in the Senate, the State Department is arguing, in effect, that Administration witnesses need not accurately reflect the executive's understanding of a treaty; instead, they are free to keep that understanding a secret and may mislead the Senate into consenting to a treaty which has a secret interpretation different from the meaning presented to the Senate. This line of argument has profound implications for the legislative process in general and the constitutional role of the Senate in particular.

Executive branch statements to the Senate during hearings on a proposed treaty may provide important evidence on issues of treaty interpretation in the international arena. They fill an even more important role, however, in our constitutional system. Such statements are an integral part of the making of a treaty, often shaping its content, and well-known to all parties to the proposal.

Under Article II, section 2, clause 2 of the Constitution, the presidential power to make treaties is subject to the requirement for advice and consent by two-thirds of the Senators present. Article VI, paragraph 2, provides that treaties are the supreme law of the land, which results in giving treaties the same force and effect as legislation enacted after action by both Houses of Congress.

Louis Henkin, one of the leading constitutional authorities in this field, has noted that "although treaty-making has often been characterized as an executive function (in that special sense in which the conduct of foreign relations is executive), constitutional writers have considered the making of treaties to be different from other exercises of presidential power, principally because of the Senate's role in the process, perhaps too because treaties have particular legal and political qualities and consequences."[64]

Hamilton, in The Federalist (No. 75), clearly illustrated The intent of the Framers that treaty-making be a shared power between Congress and the President, based on mutual trust:[65]

> The power in question seems . . . to form a distinct department, and to belong, properly, neither to the legislative nor the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.

Madison took the position that "there are sufficient indications that the power of treaties is regarded by the constitution as materially different from mere executive power, and as having more affinity to the legislative than to the executive character."[66]

The Senate has played a vital role in numerous treaty negotiations, through means such as the process of confirming negotiators, statutory requirements for congressional consultation during the negotiations process, and informal discussions.[67] Under current practice, when a proposed treaty is submitted, the Senate may consent to the treaty, withhold its consent (either expressly or through inaction), or approve it with conditions.[68]

Because the Senate is an active participant in the making of the treaty, the hearings and debates are a vital source of information as to what the treaty means. The nature of the issue and the testimony of executive branch witnesses may lead the Senate to attach conditions (e.g., if there is dispute as to a provision) or forego conditions (e.g., if there is an authoritative statement as to the meaning of a provision.)

The position of the State Department sends a clear message to the Senate: you cannot rely on our representations as to the meaning of a treaty. The adverse consequences of this proposition extend far beyond the issues at hand regarding the ABM treaty. Our treaty relationships involve not only arms control matters, but also trade and business matters affecting the economic well-being of our nation. We cannot ask the public to support proposed treaties if the executive takes the position that uncontradicted formal representations by senior officials are irrelevant as to the meaning of a treaty.

Because treaties are the supreme law of the land, the position of the State Department, if accepted by the Executive

Branch, would compel the Senate to incorporate into its resolution of consent an "amendment" or "understanding" for every explanation given by an executive branch witness lest it be disavowed as "unilateral" after ratification. Treaties so laden would sink under their own weight. It would be extremely difficult to achieve bilateral agreements, and virtually impossible for the United States to participate in multilateral treaties. In addition, the Senate would feel compelled to request in each case a complete record of the negotiating history in order to ensure that no secret understandings would emerge contrary to assurances given to the Senate.

In short, in an effort to save the Reinterpretation by asserting that Executive Branch statements to the Senate are essentially meaningless, the State Department is risking a serious constitutional confrontation involving the Executive Branch and Congress. It would be a mistake for the Executive Branch to compound the problem further by asserting that the Senate has no role to play with respect to the meaning of treaties. Although the President traditionally has determined the position of the United States as to the meaning of a treaty for international purposes, his authority is not unilateral. It is subject, for example, to any understandings imposed by the Senate in its consent to ratification.[69] Moreover, as noted by Henkin, "Congress, too, has occasion to interpret a treaty when it considers implementing legislation or other legislation on the same subject [and has] ... claimed the right to interpret a treaty independently, even while admitting that the Executive's interpretation is entitled to 'great weight.' It could happen, then, that Congress and the courts would in effect apply treaty provisions differently from those that bind the United States internationally -- another cost of the separation of powers."[70]

As a general proposition, the views of the Executive on the interpretation of a treaty normally receive great deference from the Congress. Application of that principle in terms of the meaning presented to the Senate by the Executive Branch at the time of ratification leads to an interpretation that mobile/space-based exotics may not be developed or tested. Under the Reinterpretation, such testing and development is permitted. In this situation, many in the Senate may be inclined to apply the classic line of cross-examination to the Executive Branch: "Should we believe what you were telling us then or should we believe what you are telling us now?"

The Senate has the right to presume that Executive Branch witnesses are informed and truthful in their testimony, particularly when it comes to the Senate's constitutional role as a participant in the treaty-making process. The State Department's assertion that the executive, in effect, may mislead the Senate as to the meaning of a Treaty has the unfortunate effect of directly challenging the Senate's constitutional role. The effect may well produce a Congressional backlash through exercise of the power of the purse and the power to raise and support armies in a manner that would give effect to the original meaning of the Treaty as presented to the Senate.

C. Conclusion

The Senate was clearly informed by the Executive Branch that the Treaty prohibits testing and development of mobile/space-based ABMs using exotics. This was an issue which key Senators viewed as a matter of significance, and which was directly addressed by the Executive Branch during the treaty-making process in statements to the Senate. These circumstances raise a number of possibilities with respect to the significance of other evidence as to the meaning of the Treaty:

a. If the negotiating record and evidence of subsequent practice by the parties supports the Traditional Interpretation, the issue would be beyond question.

b. If the negotiating record and evidence of subsequent practice is ambiguous or inconclusive, there would be no basis for abandoning the Traditional Interpretation as clearly understood by the Senate at the time it gave its advice and consent on the basis of this understanding. Absent compelling evidence that the Senate was misinformed as to the agreement between the United States and the Soviet Union, the compact reached between the Senate and the Executive Branch at the time of ratification should be upheld.

c. If the negotiating record and evidence of the subsequent practices of the United States and the Soviet Union establish a conclusive basis for the Reinterpretation, this would mean that the Nixon Administration signed one contract with the Soviets and the Senate ratified a different contract. Such a conclusion would have profoundly disturbing constitutional implications -- to say the least. In effect, the President would have to choose between the Executive Branch's obligations to the Senate and its contract with the Soviet Union. If he did not choose to honor the commitments the Senate, the Senate would have to develop an appropriate response or risk having its role in the treaty-making process become meaningless.

In two reports which I intend to present to the Senate within a few days, I will address the subsequent practice of the two parties and the Treaty negotiating record with a view towards determining which of the three situations currently confronts the Senate.

PART TWO:
SUBSEQUENT PRACTICE UNDER THE ABM TREATY

I. Introduction

In Part One of this Report I addressed the crucial issues of the Senate's original understanding of the meaning of the ABM Treaty and the implications of that understanding for current executive branch conduct. I concluded that the Nixon Administration presented the Senate with the so-called "Traditional Interpretation" of the Treaty's limits on the development or testing of mobile/space-based exotics -- that is, that such activities were banned. I also concluded that the Senate clearly understood this to be the case at the time it gave its advice and consent to the ratification of the Treaty. In my judgement, this conclusion is compelling beyond a reasonable doubt.

In addition, I took sharp exception to the Administration's recent claim that statements made by the executive branch to the Senate at the time of treaty ratification proceedings have "absolutely no standing" with other states party to such treaties.[71] In my opinion, this claim is incorrect in the specific case of the ABM Treaty and is squarely in conflict with the constitutional role of the Senate.

In Part Two of this Report, I will address the available record of U.S. and Soviet practices -- including their public statement -- since the Treaty was signed in May 1972. As I noted in Part One, both international law and U.S. domestic law recognize that the practices of the parties, including their statements, provide evidence of their intent with regard to the meaning of a treaty.

The record of U.S. and Soviet subsequent practice now available to the Senate is far from comprehensive. For example, the Senate has no access to statements made by American and Soviet officials in the 1972-1985 timeframe in the course of negotiations in SALT II, START, INF or the Standing Consultative Commission (SCC). Nor does the Senate have access to statements made by U.S. or Soviet officials during summit meetings, foreign minister-level discussions or routine diplomatic contacts.

President Reagan recently directed the State Department to conduct a thorough review of this issue. It is unfortunate that a rigorous Administration study of subsequent practice -- which has an important bearing on the whole question of treaty interpretation -- was not conducted prior to such a major shift in U.S. policy. The Administration has indicated that this study will be completed by April 30 and has promised that it will be submitted to the Senate for its review. Once the Senate has had an opportunity to review this study, consultations will be conducted on its conclusions.

II. Administration Positions

In an analysis submitted to the Armed Services Committee in a 1985 hearing, the State Department Legal Adviser, Abraham Sofaer, examined the record of subsequent practices.[72] These conclusions were reiterated in an article which he published in the June, 1986, Harvard Law Review.[73]

In both of these analyses, Sofaer claims that prior to the Reagan Administration's announcement of the Reinterpretation in October, 1985, the U.S. Government had not held a consistent position on the correct interpretation of the Treaty provisions governing mobile/space-based exotics. In short, Sofaer denies that the Traditional Interpretation is in fact "traditional." Rather, Sofaer insists that the version of the Treaty originally presented to the Senate was more consistent with the Reinterpretation than the Traditional Interpretation and that successive administrations fluctuated back and forth between the broader and the more restrictive positions:[74]

> Statements made during the post-ratification period have been mixed. Early statements tended to support the broader interpretation; several later ones presented a more restrictive view, some explicitly. At no time, however, was one interpretation universally accepted.

In support of the Reinterpretation, Reagan Administration officials have made other claims about subsequent practice. For example, in an appearance before the Senate Armed Services Committee on February 17 of this year, Secretary Weinberger was asked about the Treaty's effect on the development and testing of mobile/space-based exotics. The Secretary replied that "you have a situation in which this point was never either specifically considered in the ratification process, nor has it been seriously considered in the years between, because the issue itself never had any importance since no one was on our side working on strategic defense."[75] In short, Secretary Weinberger claims that not only did the issue of restrictions on exotics under the Treaty never come up during the 1972 Senate ratification debate, but also that the issue never came up in the intervening years prior to the initiation of the Strategic Defense Initiative (SDI).

Part Two of this Report totally contradicts the first of Secretary Weinberger's assertions -- that is, that the question of the Treaty's applicability to the development, testing, or deployment of laser and other exotic ABM systems or components was never addressed during the 1972 Senate ratification proceedings. This Part will consider Secretary Weinberger's assertion that the question never arose until work began on SDI, as well as Sofaer's claim that there has been no consistent U.S. view since 1972.

III. U.S. Behavior Under The Treaty

The United States has not tested or developed a mobile/space-based ABM system or component of an "exotic" design. As late as 1985, the Executive Branch, in a Department of Defense report to Congress on the SDI program, expressly endorsed the traditional view of the Treaty as the basis for structuring its activities.[76] This patter of behavior is fully consistent with the Traditional view of the Treaty.

IV. Soviet Behavior Under The Treaty

Neither the Reagan Administration nor any of its predecessors has asserted that the Soviet Union has developed or tested a mobile/space-based ABM system or component in contravention of the traditional view of the Treaty. No such finding has ever been included in any compliance report submitted by this Administration, including the report submitted on March 10, 1987.[77]

V. U.S. Statements About Limitations on "Exotics"

The ABM Treaty was signed on May 26, 1972. The Senate gave its consent on August 3, 1972, and the Treaty entered into force on October 3, of that year. Thirteen years later, on October 6, 1985, Robert McFarlane announced the reinterpretation. The thirteen-year period from May 26, 1972 until October 6, 1985 has been examined with a view towards identifying three cateogries of statements:

1. Those which explicitly support the reinterpretation.

2. Those which explicitly support the traditional view.

3. Those which generally address the subject of testing, development or deployment of exotics but which do not explicitly support either interpretation.

A. There were no Executive Branch statements that explicitly support the reinterpretation.

Sofaer has not identified any official statements prior to October, 1985 in which the U.S. government expressly took the position that the Treaty permitted testing and development of mobile/space-based exotics.

B. U.S. Statements that expressly support the traditional view

As noted in Part One, the Nixon Administration clearly took the position in its testimony to the Senate that the Treaty banned mobile/space-based ABMs using exotics. This position was announced in public subsequent to the signing of the agreement by the heads of state, but prior to when the Treaty entered into force.

With respect to statements made after the Treaty entered into force, the available record of both official and unofficial U.S. statements directly contradicts both Secretary Weinberger's assertion that this issue never came up prior to the initiation of SDI and Sofaer's claim that the U.S. position on the issue has not been consistent.

1. Official U.S. Statements

a. The Arms Control Impact Statement for FY79

In 1975, Congress amended the Arms Control and Disarmament Act to require the Executive Branch to prepare an Arms Control Impact Statement (ACIS) for submission with requests for authorization and appropriation of defense and nuclear programs. The first two such submissions, for FY1977 and FY1978, were criticized as too general by the Chairmen of the Senate Foreign

Relations Committee and House Foreign Affairs Committee. A more detailed report was prepared for FY 1979, involving an intensive interagency review process, including final review and approval by the National Security Council. As such, it represented the formal, coordinated views of the Executive Branch.

The FY79 ACIS, which was the first Arms Control Impact Statement to address the issue of testing and development of mobile/space-based ABMs using exotics under the ABM Treaty, contained the following key passage:[78]

> PBWs [particle beam weapons] used for BMD [ballistic missile defense] which are fixed, land-based could be developed and tested but not deployed without amendment of the ABM Treaty, and the development, testing, and deployment of such systems which are other than fixed, land-based is prohibited by Article V of the Treaty. (emphasis added)

This clear statement by the Executive Branch severely undermines the Reinterpretation because it confirms the traditional meaning of the Treaty as provided to the Senate in 1972.

b. Arms Control Impact Statements for FY 80-86.

The Arms Control Impact Statements submitted by the Executive Branch through FY86, including those submitted by the Reagan Administration, consistently took the position that mobile/space-based ABMs using exotics could not be tested and developed under the ABM Treaty.[79] These statements include express reaffirmation by the Reagan Administration of the Traditional Interpretation.

c. 1985 SDIO Report To Congress

This document, submitted to the Congress in March 1985, contained an appendix on "The Strategic Defense Initiative (SDI) and the ABM Treaty." As Sofaer has noted, this document "expressly embraced the restrictive interpretation."[80] It is further confirmation of the traditional view by the Reagan Administration.

2. Unofficial Publications On the Negotiations

In the years after the ABM Treaty entered into force, several books were published which provided unofficial accounts of the negotiations and descriptions of the meaning of the Treaty's provisions. *Cold Dawn: The Story of SALT*, published in 1973, was written by John Newhouse, a former Senate Foreign Relations Committee staff member, based on interviews with the participants. It has also been reported that Newhouse had direct access to classified Nixon Administration documents. *Cold Dawn*, which was widely regarded as the first comprehensive account of the negotiations, contains the following passages concerning "exotics":[81]

> NSDM 127 [the instructions to the negotiators] banned everything other than research and development of fixed, land-based exotics. There remained to convince Moscow

> that the great powers should remove exotics future threats to stability, as well as the immediate ones.
>
> . . .
>
> Although the basic ABM agreement would be left for an eleventh-hour White House decision, the delegation managed a major breakthrough toward the end of January when the Soviets accepted the U.S. position on exotic systems. Back in the summer, Moscow's attitude, as reflected by its delegation, had been sympathetic. Then, in the autumn, it hardened, probably under pressure from the military bureaucracy. Washington was accused of injecting an entirely new issue. Moscow would not agree to a ban on future defensive systems, except for those that might be space-based, sea-based, air-based, or mobile land-based. The U.S. Delegation persisted and was rewarded. Land-based exotics would also be banned. The front channel had produced an achievement of incalculable value.

In 1974, John Rhinelander, Legal Adviser to the U.S. Delegation, co-authored a book on the SALT accords which contains the following passages relevant to the "exotics" issue:[82]

> Article II defines an ABM system as "currently consisting of ABM launchers, interceptor missiles and radars." The prohibitions of the ABM Treaty are not limited to ABMs with nuclear warheads, although current ABM interceptors are nuclear-equipped. Articles II and III provide the treaty framework for the ban on "future ABM systems," which is spelled out further in an agreed interpretation.* [ABM Treaty, Initialed Statement D]
>
> The future systems ban applies to devices which would be capable of substituting for one or more of the three basic ABM components, such as "killer" laser or particle accelerator. Article III of the Treaty does not preclude either development or testing of fixed, land-based devices which could substitute for ABM components, but does prohibit their deployment. Article V, on the other hand, prohibits development and testing, as well as deployment, of air-based, sea-based, space-based, or mobile land-based ABM systems or components, which includes "future systems" for those kinds of environments. The overall effect of the treaty is, therefore, to prohibit any deployment of future systems and to limit their development and testing to those in a fixed, land-based mode.

In 1977, Raymond Garthoff, the Executive Officer of the U.S. SALT I Delegation, published an article in International Security entitled, "Negotiating With The Russians: Some Lessons From SALT". In this article, he made only a cryptic reference to the Treaty's limitations on "exotics," noting: "Another example concerns the important provisions of the Treaty and associated Agreed Interpretation banning 'futuristic' anti-ballistic systems (Article III and Agreed Interpretation [D]."[83]

In a letter to the editor published in the next issue of this periodical, a RAND analyst, Abraham Becker, argued that a reasonable reading of Agreed Statement D indicated that there were no limitations on "exotics" -- including no ban on their deployment. Becker stated, "I am not a lawyer, but 'subject to discussion' seems to me to impose no obligation other than, perhaps, to 'discuss'."[84]

Becker then provided a critique of the traditional interpretation of the Treaty which could well be seen as the precursor for the line of argument advanced by Judge Sofaer eight years later, emphasizing the alleged redundancy of Agreed Statement D under the traditional interpretation:[85]

> One might ask why Agreed Interpretation [D] was necessary at all. Does not the introductory phrase of Article III - "Each Party undertakes not to deploy ABM systems or their components except that" -- rule out any deployments other than those permitted by the two following paragraphs? Why then is that special provision necessary for the contingency of exotic systems? The answer seems to be that the Treaty's core limitations in Article III relate to a specific form of ABM technology. Thus there was a need to adapt the

> limitations of Article III to possible future systems using alternative technologies.
>
> However, this raises the more general problem that Article II, Paragraph 1 defines ABM systems for the purpose of this Treaty as consisting of ABM interceptor missiles, ABM interceptor missile launchers, and ABM radars. Presumably, Article V ... also refers to such systems. There would, therefore, appear to be no prohibitions against developing, testing or deploying any system ... that does not employ the canonical ABM triad. The only bar to such an interpretation consists of one word in Article II, Paragraph 1 -- "currently".

In a rebuttal published in the same issue, Garthoff replied as follows:[86]

> ...Becker incorrectly interprets Article V as not applying to futuristic types of systems including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars. The reason for his erroneous interpretation is that he curiously assumes that "the only bar to such an interpretation consists of one word." The same could be said of the Ten Commandments. One word can indeed make a critical difference, and the word "currently" was deliberately inserted into a previously adopted text of Article II at the time agreement was reached on the future systems ban in order to have the very effect of closing a loophole to the ban on futures in both Articles III and V (and several others). The wording of the key introductory sentence of Article III was also agreed on at the time and for that purpose.
>
> While admittedly the result has a Rube Goldberg air to it, the interlocking effects of the final wording of Articles II and III and Agreed Interpretation [D] was intentionally devised and clearly understood -- by both Delegations -- to ban future "ABM systems based on other physical principles and capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars" unless specific limitations short of a ban were agreed on under the amendment procedures. The negotiating history fully supports the interpretation given by the Delegation, Mr. Rhinelander, and myself.

The publication of the Becker/Garthoff correspondence in the summer of 1977 set off a flurry of letters between a number of prominent U.S. strategic thinkers and former, as well as then-current, arms control officials, including Rhinelander, Garthoff, Paul Nitze, Donald Brennan (Hudson Institute), Gerard Smith, Paul Warnke, Sid Graybeal and Herbert Scoville. A consistent theme in these letters was that the ABM Treaty prohibited the deployment of all "exotics", and development and testing of such systems was authorized only for those which were fixed, land-based.

For example, in a July 8, 1977 letter to Brennan, Nitze said:[87]

> The specific format of the Treaty, particularly of Article III...was to prohibit deployment of everything not specifically permitted. Future systems and their components could thus only be deployed pursuant to amendment of the Treaty after mutual discussion to work out limits appropriate to such future systems. It is therefore correct that Agreed Interpretation [D] was a work of supererogation and not strictly required.

Nitze now asserts that the negotiating record supports the Reinterpretation.[88] He is the only principal negotiator who now holds that view. I shall return to this matter in my report on the negotiating record.

On July 13, 1977, Rhinelander stated in a letter to Brennan: "Article V, paragraph 1, prohibits the development, testing or deployment of a sea-, air-, space-, and mobile-land-based ABM systems or components. This encompasses present and future technology."[89]

Finally, in a July 15, 1977 letter, which seemed to put the issue to rest within this circle of experts, Brennan conceded that his initial view of the Treaty was incorrect:[90]

> In the face of this level of analysis, not to mention the essential concurrence of Smith, Nitze and Garthoff, any further insistence that the Treaty does not necessarily ban the development of (among others) space-based exotic systems would have to be reckoned willful, indeed obstinate, stupidity.

Brennan also noted that he had "no reason to believe that the Soviets disagree with our interpretation of the Treaty."

C. U.S. Statements Supportive of Either Interpretation

1. Early Post-Negotiation Statements

a. Testimony to the House

During the House of Representatives' review of the SALT I accords in the summer of 1972, the question of the applicability of the ABM Treaty to lasers or other exotic ABMs was only raised on a few occasions and never in any detail. In general, statements by executive branch officials that did touch on this issue in the course of House testimony fell into one or the other of the two categories of imprecise or incomplete comments which I discussed in Part One concerning the Senate ratification proceedings. These two categories are, first, a general statement to the effect that exotics cannot be deployed unless the Treaty is amended but which provided no elaboration as to the limits on development or testing; and second, a general assurance that R&D on laser ABMs could continue, but which did not distinguished between fixed, land-based systems and mobile/space-based systems.

For example, on July 25, 1972, Ambassador Smith told the House Armed Services Committee:[97]

> An additional important qualitative limitation is the prohibition on the development and testing, as well as deployment, of sea, air, space-based and land-mobile ABM systems and components. Of perhaps even greater importance as a qualitative limitation is the prohibition on the deployment of future types of ABM systems that are based on physical principles different from present technology.

As I discussed in Part One, the Reinterpretation presumes that if Smith had believed that the Traditional Interpretation had been agreed to, he would not have said only that futures were not deployable, he would have said that the development, testing, or deployment of futures was banned.

There are three major problems with the logic on which this analysis is based. First, the Smith statement is true and accurate on its face because under either interpretation deployment of exotics is banned. Second, it attempts to build a major case on what was not said. Third, if Smith had said what the Reinterpretation postulates he should have said, he would have been wrong. Why? Because under either interpretation the development or testing of fixed, land-based exotics is permitted. Development or testing of mobile/space-based exotics is, of course, banned under the Traditional Interpretation.

I would note also that Secretary Rogers made a similar statement to the House Foreign Affairs Committee on July 20, 1972.[92]

An example of the second category of statement, including a discussion of research and development, was a July 27, 1972 response by Admiral Moorer, Chairman of the Joint Chiefs of Staff, to a question from Congressman Whitehurst about the Treaty's effect on "some kind of technological breakthrough, perhaps something beyond Spartan or Sprint in the state of the art." Admiral Moorer read Agreed Statement D and then said "there is no restraint on research and development."[93]

Several comments about this reply are in order. First, Admiral Moorer did not differentiate between basing modes, i.e., fixed, land-based versus mobile/space-based. Thus under the Traditional Interpretation, Admiral Moorer's statement is correct as it applies to fixed, land-based laser ABMs. Second, as I mentioned in Part One, the Administration, which had been stung by Senator Jackson's criticism of an alleged cancelled laser contract, was going to lengths to assure Congress that the then-current U.S. laser ABM program --which was fixed, land-based -- could go forward through the research and development stages. In sum, the statement does not contradict either interpretation; nor does it provide explicit support for this view. Finally, as I noted in Part One, Congress was expressly advised that the Chiefs were aware that the treaty permitted testing and development of exotics only in a fixed, land-based mode, they concurred in that view, and they understood it to be a fundamental part of the Treaty.[94]

2. Post-ratification Statements

In his 1985 submission to the Armed Services Committee, Sofaer identified three cases in which official U.S. reports or statements noted that under the Treaty, new ABM systems based on "other physical principles" could not be deployed.[95] The three cases are: an October 23, 1972 speech at the UN by Ambassador Bush, the ACDA Annual Report for 1972, and Secretary Roger's Foreign Policy Report of April 19, 1973. Sofaer does not identify any aspect of these statement that directly addresses testing and development. As with the Smith and Rogers statements discussed above, brief statements to the effect that "exotics can not be deployed," but which are silent on the question of limits on development and testing, cannot be read as compelling any particular interpretation of the treaty.

a. ACDA Compilations of Arms Control Agreements

Since 1972, the Arms Control and Disarmament Agency has prepared five editions of a publication containing the texts of the principal arms control agreements to which the United States is a party, accompanied by brief narrative descriptions of the texts and the history of the negotiations which led to the agreements.

Each edition, including the most recent (1982), contains a paragraph relevant to the the issue of "exotics." In his 1985 submission to the Committee, Sofaer quotes the following excerpt from the 1982 ACDA compilation report:[96]

> Should future technology bring forth new ABM systems "based on other physical principles" than those employed in current systems, it was agreed that limiting such systems would be discussed, in accordance with the treaty's provisions for consultation and amendment.

Sofaer cites this in his review of subsequent practice for the proposition that: "ACDA's periodic compilation of arms control agreements has consistently supported the 'broad' view of the Treaty." He maintains that although the record of U.S. statements between 1972-1985 is "mixed", "the one document that tracks the issue over the 1972-1982 period -- the ACDA publication "Arms Control and Disarmament Agreements" -- appears to reflect that future systems are regulated only by Agreed Statement D."[97]

There are a number of problems with Sofaer's effort to represent this ACDA publication as a definitive and consistent endorsement of the his reinterpretation. As with similar statements made during the ratification hearings, the ACDA report does not compel any particular interpretation of the Treaty. It is consistent with either the traditional view (under which exotics may be tested or developed in a fixed, land-based mode, which was then the focus of U.S. research) or the reinterpretation (permitting testing and development of all exotics.) The preface to the ACDA publication underscores the generality of its content, specifically noting that this material provides a "brief narrative discussion" of the the Treaties contained therein.

Another difficulty is that in his 1985 submission to the Senate Armed Services Committee,[98] Sofaer omitted the crucial first sentence of this paragraph, which reads: "Further, to decrease the pressures of technological change and its unsettling impact on the strategic balance, both sides agree to prohibit development, testing, or deployment of sea-based, air-based, or space-based ABM systems and their components, along with mobile land-based ABM systems." This sentence clearly ties to prohibitions in Article V of the Treaty against testing and development of mobile systems to the goal of decreasing "the pressures of technological change", thereby implying strongly that the Treaty prohibits testing and development of mobile ABM systems which would incorporate future technologies. Sofaer reinserted this sentence in his June, 1986 article in the Harvard Law Review, but he fails to deal with its implications for his analysis.[99]

A more serious problem for the Sofaer analysis is its failure to reconcile the brief, narrative statement in ACDA's compilation of treaties, with the Executive Branch's express treatment of the the prohibition on testing and development of mobile exotics in the FY 79-86 Arms Control Impact Statements (ACIS), is typical of the case for the reinterpretation that the brief ACDA narrative, which Sofaer fails to identify as being brief is quoted in full in the text, while the directly applicable analysis contained in the ACIS -- prepared by the Executive Branch -- is merely referenced in a footnote. It is particularly illogical for Sofaer to assert that a periodical compilation of agreements prepared by one agency (ACDA) should be held up as more revealing and authoritative than the Arms Control Impact Statements, which were meticulously prepared through a rigorous inter-agency process, including review by the NSC, and submitted, under close congressional scrutiny, on behalf of the President.

In summary, there are three main problems with Sofaer's reliance on the ACDA compilation. First, the statement which he cites does not support the Reinterpretation. Second, the compilation does not purport to be a comprehensive statement of U.S. government policy. Third, a far more authoritative and comprehensive statement is contained in the Arms Control Impact Statements, which were submitted to the Congress on behalf of the President for the express purpose of assisting the Congress in making policy decisions concerning the funding of U.S. defense programs.

VI. Soviet Statements

Sofaer does not rely on any Soviets statements in the case for reinterpretation, but notes that the few remarks by the

Soviets on the subject are "illuminating." He quotes only one Soviet statement, a 1972 remark generally noting that the "Treaty imposes no limitations on the performance of research and experimental work aimed at resolving the problem of defending the country against nuclear missile attack."[100]

Several comments about this statement are in order. First, Grechko does not define "experimental work." He did not say "development;" nor did he refer to "exotics." Even if he had said "development" and linked it specifically to "exotics," it would have been correct under the traditional view, which permits testing and development of fixed, land-based ABMs using exotics. Because this statement makes no reference to mobile/space-based ABMs, it is merely another general statement consistent with either view of the Treaty.

Sofaer also states that the Soviets did not "begin explicitly to articulate the restrictive interpretation" until the new U.S. position was announced in October, 1985. This is not particularly helpful to the case for reinterpretation. The Soviets were on notice of U.S. adherence to the traditional view not only from the ratification debate, but also from the the official Arms Control Impact Statements noted above, and as far as available information shows, they made no objection to the traditional view of the Treaty.

VII Conclusions

The Administration has not provided any information to date demonstrating Soviet practices or statements expressly embracing the reinterpretation. Given the Reagan Administration's repeated endorsement of the Traditional Interpretation in the annual Arms Control Impact Statements it submitted prior to October, 1985, any violations of that view presumably would have been brought to the public's attention. It is possible, of course, that the new Administration review will uncover some heretofore unknown Soviet activities or statements.[101] It must be remembered, however, that subsequent statements and practices constitute evidence to be used in treaty interpretation, and the context of the practices or statements is crucial. If such evidence is unearthed by the Administration, it will have to be weighed carefully in light of all relevant facts and circumstances.

In Part Three, I will turn to the final element in this reinterpretation controversy, the question of the Treaty negotiating record.

PART THREE: THE ABM TREATY NEGOTIATING RECORD -- AN OVERVIEW

In Part One of this Report, I addressed the original meaning of the Treaty as presented to the Senate in 1972. Part II discussed the statements and practices of the parties from the time the Treaty was signed in 1972 until the reinterpretation was announced in late 1985. The following will address the record of the ABM Treaty negotiations in 1971 and 1972 as provided to the Senate by the Department of State.

In Part One I concluded that the Nixon Administration explicitly told the Senate during the treaty ratification proceedings that the Treaty prohibits the development and testing of mobile/space-based ABMs using exotics. I also concluded that the Senate clearly understood this to be the case at the time it gave its advice and consent to the Treaty and that the evidence of this is compelling beyond a reasonable doubt.

In Part Two I reviewed the available record of U.S. and Soviet practices and statements during the thirteen year period between the signing of the Treaty and the announcement of the Reinterpretation in October 1985. Under both international and domestic law, such evidence may be considered in determining the meaning of the Treaty. Based on the information provided to the Senate to date by the State Department, I found no evidence which contradicted the Senate's original understanding of the meaning of the Treaty. On the contrary, I noted that successive administrations, including the Reagan Administration, had prior to 1985 consistently indicated that the Treaty banned the development and testing of mobile/space-based ABMs using exotics.

Let me sum up, then, where the situation now stands after the first two parts of this Report. First, the Reagan Administration made a case for a broader reading of the Treaty based, in part, on an analysis of the Senate ratification proceedings, arguing that the record of this debate supported the Reinterpretation. I found this case not to be credible. Second, the Reagan Administration made a case for a broader reading of the Treaty based, in part, on subsequent practice, arguing that the record of U.S. and Soviet statements and practices supported the Reinterpretation. I also found this case not to be persuasive.

Some advocates of the broader reading -- including its principal author, Judge Sofaer -- now appear to be hanging their hats on the negotiating record, arguing that the negotiating record provides persuasive or compelling support for their case. As I noted in Part One, the Administration's focus on the negotiating record as a primary source of treaty interpretation confronts us with three separate possibilities:

- If the negotiating record is consistent with the original meaning of the Treaty as provided to the Senate by the Executive Branch, the Traditional Interpretation would prevail beyond question.

- If the negotiating record is ambiguous or inconclusive, there would be no basis for abandoning the Traditional Interpretation. Absent compelling evidence that the contract consented to by the United States Senate was not the same contract entered into between the Nixon Administration and the Soviet Union--and we do not have that kind of evidence--the treaty presented to the Senate at the time of ratification should be upheld.

- If, on the other hand, the negotiating record clearly establishes a conclusive basis for the Reinterpretation, this would mean that the President signed one contract with the Soviets and the Senate ratified a different contract. Such a conclusion would have profoundly disturbing constitutional implications, and as far as I know would be a case of first impressions.

Because of the grave constitutional issues at stake, and my responsibilities as Chairman of the Armed Services Committee and Co-Chairman of the Arms Control Observer Group, I have taken an special personal interest in this matter and have spent countless hours in S-407 reviewing the negotiating record, which is still classified.

It is important to note that the material presented to the Senate by the Department of State in terms of the negotiating record consists of a disjointed collection of cables and memos. This is not unusual. There is no single document or set of documents that constitutes an official negotiating history. There is no transcript of the proceedings. Instead, we have a variety of documents of uneven quality. Some involve detailed recollections of conversations, others contain nothing more than cryptic comments.

Nonetheless, this is the record on which the Reagan Administration's decision was based. If the State Department identifies and submits other relevant documents, I will be prepared to review them as well.

Having been through the material, I well-understand why as a matter of international law, the negotiating record is the least persuasive evidence of a treaty's meaning.[102] For example, Lord McNair has said:[103]

> [N]o litigant before an international tribunal can afford to ignore the preparatory work of a treaty, but that he would probably err in making it the main plank of his argument. Subject to the limitations indicated in this chapter, it is a useful makeweight but in our submission it would be unfortunate if preparatory work ever became a main basis of interpretation. In particular, it should only be admitted when it affords evidence of the common intention of both or all parties.

The same view is set forth in the commentary to the Second Restatement of the Foreign Relations Law of the United States, which notes that "conference records kept by delegations for their own use . . . will usually be excluded" from consideration under international law, although they may be considered by national courts for domestic purposes.[104]

The materials in the negotiating record provided the Senate simply do not compare in quality to the debates and reports normally relied upon for interpretation of legislation. Nonetheless, the records provided to the Senate contain a significant amount of material bearing on the issue of the development and testing of exotics.

Based on my review, I believe that Judge Sofaer has identified some ambiguities in this record. One cannot help but wish that the U.S. and Soviet negotiators had achieved a higher level of clarity and precision in their drafting of this accord. Of course, as we in the Senate well know, writing clear law is a worthy goal but one which is not easily attained. These ambiguities are not, however, of sufficient magnitude to demonstrate that the Nixon Administration reached one agreement with the Soviets and then presented a different one to the Senate.

Notwithstanding the ambiguities, the negotiating record contains substantial and credible information which indicates that the Soviet Union did agree that the development and testing of mobile/space-based exotics was banned. I have concluded that the preponderance of evidence in the negotiating record supports the

Senate's original understanding of the Treaty -- that is, the Traditional Interpretation.

I have drafted a detailed classified analysis which examines Sofaer's arguments about the negotiating record at great length. Over the next few days, I intend to consult with the distinguished Majority Leader, Senator Byrd, about submitting this report for the review of Senators in Room S-407. I will also work with the State Department to see how much of this analysis can be declassified and released for public review. I would, of course like for all of it to be released.

It is appropriate at this juncture to pause for a moment and reflect on how the Reagan Administration could be in such serious error on its position on this crucial issue -- wrong in its analysis of the Senate ratification debate; wrong in its analysis of the record of subsequent practice, at least insofar as we have been given information on that subject; and wrong in its analysis of the negotiating record itself.

I believe that we need to take a look at the procedure by which the Administration arrived at its position. I think the procedure, as people find out more about it, will reveal itself as having been fundamentally flawed. At the time the decision was announced by the Reagan Administration, the Administration was divided as to the correct reading of the negotiating record, with lawyers at the Arms Control and Disarmament Agency, the Defense

Department, and even within Judge Sofaer's own office holding conflicting views. By his own admission, Judge Sofaer had not conducted a rigorous study of the Senate ratification proceedings or the record of U.S. and Soviet practice -- even though these are critical--indeed crucial-- elements of the overall process by which one interprets treaties. Judge Sofaer made no effort to interview any principal ABM negotiator except Ambassador Nitze -- even though most of these gentlemen were still active professionally and living in or near Washington, D.C. Finally, there was no discussion with the Senate, despite the Senate's constitutional responsibilities as a co-guarantor of treaties.

To say that this is a woefully inadequate foundation for a major policy and legal change is a vast understatement. I hope that we can now begin to address the real problems that confront our nation in the areas of arms control and the strategic balance.

There are a number of specific steps which I believe we should take to bring some final resolution to this unfortunate controversy:

First, I believe the State Department should declassify the ABM Treaty negotiating record, after consulting with and informing the Soviet Union of our intentions. The only downside I can see to declassification, since this record is at least 15 years old, is the diplomatic precedent, and that is to be considered. However, if the Soviet Union is informed and consulted in advance of declassification, it seems to me that there would be no adverse precedent.

Second, we must recognize that by upholding the Traditional Interpretation of the Treaty, we certainly will not eliminate all the ambiguities with respect to the effect of the Treaty. The United States and the Soviet Union have not reached a meeting of the minds on the precise meaning of such important words as "development," "component," "testing in an ABM mode," and "other physical principles." The appropriate forum for attempting to remove these ambiguities is the Standing Consultative Commission (SCC), as specified in the Treaty. I strongly recommend that the SCC be tasked with the very important job of discussing these terms with the Soviet representatives and trying to come to mutual agreement.

Third, and most important, we should continue to negotiate towards agreement in Geneva on a new accord limiting offensive as well as defensive systems which would supercede the ABM Treaty as well as SALT II, and that would, of course, render moot this whole debate about the broad versus narrow interpretation. Nothing would be better than to render this argument moot by entering into a comprehensive agreement on offense and defense and to have the terms defined with precision, clear up these ambiguities, and move on into the new arms control era.

Finally, we must develop an objective analysis of what tests are necessary under the Strategic Defense Initiative which cannot be conducted under the Traditional Interpretation. We were told last year by General Abrahamson, the head of this project, that there were no tests which would be adversely impacted by the Traditional Interpretation before the early 1990's. If that has changed, we need to know what changes have taken place and what has driven those changes.

I want to emphasize that our Armed Services Committee needs this analysis and we need it before we begin the markup of our committee bill, because any discussion of what SDI funding is going to be used for has to have as a foundation the overall interpretation and the tests that will be conducted thereunder.

I emphasize also that the determination should be based on sound technological assessment and not on an ideologically-driven kind of judgement. It is important for us to know that we are getting an analysis by scientists and not ideologs who have an agenda that has nothing to do with the technology and the tests at hand.

FOOTNOTES

1. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, 23 U.S.T. 3435, T.I.A.S. No. 7503 [hereinafter cited as ABM Treaty].

2. *Strategic Arms Limitation Agreements: Hearings before the Senate Foreign Relations Committee*, 92d Cong., 2d Session 5 [hereinafter cited as *1972 Foreign Relations Hearings*]

3. *See* Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 Harv. L. Rev. 1972 (1986). Sofaer also has described his analysis in a number of congressional hearings. *E.g., Strategic Defense Initiative, Hearings Before the Senate Committee on Armed Services*, 99th Cong., 1st Sess. 136-91 (1985) [hereinafter cited as *1985 Senate Hearings*]; *Treaty Interpretation Dispute: Hearing Before the Subcommittee on Arms Control, International Security and Science of the House Comm. on Foreign Affairs*, 99th Cong., 1st Sess. 4-51 [hereinafter cited as *1985 House Hearing*].

4. *1985 Senate Hearings*, *supra* note 3, at 142.

5. *Id*. at 167.

6. *Id*. at 141.

7. *1985 House Hearing*, *supra* note 3, at 10.

8. *1985 Senate Hearings*, *supra* note 3, at 264.

9. *Id*. at 398.

10. *Id*. at 399.

11. *See* note 3 *supra*.

12. The Vienna Convention on the Law of Treaties, Signed by the United States in Vienna, April 24, 1970, submitted to the Senate on November 22, 1971 by President Nixon but not ratified, Executive L, 92d Congress, 1st Session, 8 I.L.M. 679.

13. Lord McNair, *Law of Treaties* 380-81 (1961). *See also*, McDougal, Lasswell and Miller, *The Interpretation of Agreements and World Public Order* 82-111 (1967).

14. McNair, *supra*, at 425.

15. *Restatement of the Law, Foreign Relations Law of the United States (Revised)*, Tentative Draft No. 6 - Volume 2, April 12, 1985.

16. Id.; McDougal, Lasswell, and Miller, supra note 13, at 132-44.

17. 279 U.S. 47 (1929); see Air France v. Saks, 470 U.S. 392, 396 (1985).

18. Restatement, supra note 15, at 325-4.

19. Military Implications of the Treaty on the Limitations of Anti-Ballistic Missile Systems and the Interim Agreement on Limitation of Strategic Offensive Arms: Hearings Before the Senate Committee on Armed Services, 92d Cong., 2d Sess. 40 (1972) [hereinafter cited as 1972 Armed Services Hearings].

20. Id. at 40-41.

21. "Analysis of U.S. Post-Negotiation Public Statements Interpreting the ABM Treaty's Application to Future Systems," The Legal Adviser, U.S. Department of State, October 30, 1985, reprinted in 1985 Senate Hearings, supra note 3, at 167.

22. 99 Harv. L. Rev. at 1982 n. 28.

23. 118 Cong. Rec. 19,411 (1972). Senator Jackson said, "I was greatly disturbed, for example, to learn only yesterday that Secretary Laird has ordered the cancellation of a theoretical study conducted by one of our research organizations of the application of laser technology to ballistic missile defense. Nothing in the agreements as they have been published would call for this action."

24. 1972 Armed Services Hearings, supra note 19, at 31.

25. Id. at 274

26. Id. at 275.

27. Id., transcript at 312.

28. 1985 Senate Hearings, supra note 3, at 169-170.

29. Id. at 171.

30. Id. at 170.

31. Id. at 171.

32. 1972 Armed Services Hearings, supra note 19, at 439.

33. Id. at 440.

34. Id. at 438-40.

35. *Id*. at 443.

36. *1972 Foreign Relations* Hearings, *supra* note 2, at 258.

37. *Id*. at 268.

38. *Id*. at 269.

39. 118 *Cong. Rec.* 26,703 (1972).

40. *1985 Senate Hearings*, *supra* note 3, at 171.

41. 118 *Cong. Rec.* 26,700 (1972).

42. *1985 Senate Hearings*, *supra* note 3, at 171.

43. *See 1972 Armed Services Hearings*, *supra* note 19, at 99. It is noteworthy that in the same statement Smith said that Article II, which defines ABM systems covered by the Treaty, "has a very important bearing on the whole question of what we call future ABm systems." This directly contradicts the Reinterpretation, which is based on the premise that Article II does not cover future systems.

44. *1985 Senate Hearings*, supra note 3, at 168.

45. *Reprinted in 1972 Armed Services Hearings*, *supra* note 19, at 81. Under the same subheading ("Future ABM Systems"), Rogers' letter also included a discussion of the definitions in Article II and the prohibitions on deployment in Article III under this same subheading ("Future ABM Systems"), thereby indicating that such exotics were covered by these provisions. This contradicts the Reinterpretation's contention that exotics were covered only by Agreed Statement D.

46. *1972 Foreign Relations Hearings*, *supra* note 2, at 6, 20. In his prepared statement, Rogers said, "Perhaps of even greater importance as a qualitative limitation is that the parties have agreed that future exotic types of ABM systems, i.e. systems depending on such devices as lasers, may not be deployed, even in permitted areas." Later, in response to a question by Senator Aiken about laser ABMs, he said, "Under the agreement we provide that exotic ABM systems may not be deployed and that would include, of course, ABM system based on the laser principle."

47. *Id*. at 20. In response to another question by Senator Aiken on laser ABMs, Smith said:

> ...we have covered this concern of yours in this treaty by prohibiting the deployment of future type technology. Unless the Treaty is amended, both sides can only deploy launchers

and interceptors and radars. There are no inhibitions on modernizing this type of technology except that it cannot be deployed in mobile land-based or space-based or sea-based or air-based configurations. But the laser concern was considered and both sides have agreed that they will not deploy future type ABM technology unless the treaty is amended.

48. 1972 Armed Services Hearings, supra note 19, at 287. Smith said: "The development and testing, as well as deployment of sea, air, space-based, and land-mobile ABM devices is prohibited. Of perhaps even greater importance, the parties have agreed that no future types of ABM systems based on different physical principles from present technology can be deployed unless the treaty is amended."

49. Id. at 171.

50. Id. at 222.

51. Id. at 295.

52. Id. at 306.

53. 118 Cong. Rec. at 26,707 (1972). Senator Fong said, "[The Treaty] (a)llows research and development on ABM systems to continue, but not the deployment of exotic or so-called future systems."

54. Id. at 26,693.

55. 1985 Senate Hearings, supra note 3, at 167.

56. Foreign Broadcast Information Service, Oct. 19, 1985, at AA3.

57. 99 Harv. L. Rev. at 1985 n.37.

58. McNair, supra note 13, at 424.

59. Id. at 427.

60. Id. at 429.

61. Corbin on Contracts (C. Kaufman, ed., Supp. 1984), at 462.

62. McNair, supra note 13, at 431. Cf. Anglo-Iranian Oil Case (United Kingdom v. Iran) ICJ Reports (1952) at 16-18 in which the International Court of Justice noted the failure of the British Government to object to Iranian domestic legisation as evidence of Iran's obligations under a treaty with respect to the British Government.

63. 1972 Armed Services Hearings, supra note 19, at 437. This exchange -- which immediately preceded the discussion in

which the word laser was used thirteen times -- went as follows:

> Senator Goldwater: I recognize what I have said about the inability of the man in uniform and inability of the man in civilian clothes to answer pertinent questions that I think we should have the answers to, and I keep thinking of Senator Jackson's remarks here about the member of the Soviet embassy. Is he here today?
>
> Senator Jackson: Yes.
>
> Senator Goldwater: He is an expert in this field - Senator Jackson said this gentleman knows all the answers to the questions I am asking - I can't understand why a U.S. Senator can't have the same knowledge.

64. L. Henkin, *Foreign Affairs and the Constitution* 130 (1972).

65. *The Federalist Papers*, No. 75, *Treaties and Other International Agreements: The Role of the Senate*, S. Prt. No. 205, 98th Cong., 2d Sess. 29 (1984) (Prepared for the Senate Foreign Relations Committee by the Congressional Research Service).

66. Quoted in *Henkin*, *supra* note 64 at 130, n.*.

67. *See* Henkin, *supra* note 64, at 131-36; S. Prt. No. 205, *supra* note 65, at 30-36.

68. S. Rpt. 205, *supra* note 65, at 109-18.

69. *Id.* at 119-29.

70. *Henkin*, *supra* note 64, at 167, n.*

71. Secretary of State, George Shultz, *ABC News This Week with David Brinkley*, February 8, 1987.

72. *1985 Senate Hearings*, *supra* note 3, at 167-173.

73. 99 Harv. L. Rev. at 1972.

74. *Id*. at 1983.

75. Transcript of Senate Armed Services Committee Hearing, February 17, 1987.

76. U.S. Dept. of Defense, Report to Congress on the Strategic Defense Initiative app. Sec. B.I.2. (1985)

77. The President's Unclassified Report on Soviet Noncompliance with Arms Control Agreements, March 10, 1987.

78. House Comm. on Intl Relations and Sen. Comm. on Foreign Relations, 95th Cong., 2d Sess. Fiscal Year 1972 Arms Control Impact Statement 231 (Jt. Comm. Prt. 1978).

79. Cited in 99 Harv. L. Rev. at 1984 n. 34.

80. *Id*. at 1984.

81. J. Newhouse *Cold Dawn: The Story of SALT* 230-231 and 237 (1973).

82. Willrich, Mason and John B. Rhinelauder, *SALT: The Moscow Agreements and Beyond* 128 (1974).

83. Garthoff "Negotiating with the Russians: Some Lessons From SALT," *International Security* Vol. 1, No. 4, (Spring, 1977) at 18.

84. *Id*., Vol. 2, No. 1 (Summer, 1977) at 106.

85. *Id*.

86. *Id*. at 107.

87. Letter to Donald G. Brennan, Hudson Institute, July 8, 1977.

88. *See 1985 House Hearings*, *supra* note 3, at 37.

89. Letter to Donald G. Brennan, Hudson Institute, July 13, 1977.

90. Letter to John B. Rhinelander, July 15, 1977.

91. *Full Committee Hearings on the Military Implications of the Strategic Arms Limitation Talks Agreements*. (House Armed Services Committee No. 92-68), [hereinafter cited as *1972 House Armed Services Hearings*] 92d Cong., 2d session 15086 (1972).

92. *Agreement on Limitation of Strategic Offensive Weapons: Hearings Before the House Foreign Affairs Committee*, 92d Cong., 2d Session 5 (1972).

93. *1972 House Armed Services Hearings*, *supra* note 91, at 15125.

94. *1972 Armed Services Committee Hearings*, *supra* note 19, at 443.

95. *1985 Senate Hearings*, *supra* note 3, at 171-172.

96. *Id*. at 172.

97. *Id*. at 173.

98. Id. at 172.

99. 99 Harv. L. Rev., supra, note 3 at 1984.

100. Id. at 1985 n.37.

101. For example, recent press reports have mentioned the discovery of two Soviet statements which allegedly provide strong support for the Traditional Interpretation: (1) a March 16, 1976 statement by Soviet SALT II negotiator Viktor Karpov confirming that Article II of the ABM Treaty applies to exotics and (2) a May 1985 statement in the SCC by Soviet representative Viktor Starodubov.

102. See, e.g., Articles 31 and 32 of the Vienna Convention, supra note 12. The Convention, signed but not ratified by the United States, is cited by Sofaer as an authoritative source of law on the subject of treaty interpretation, 99 Harv. L. Rev. at 1978.

103. McNair, supra note 13, at 422-23.

104. Restatement (Second), Foreign Relations Law of the United States (1962), sec. 147 (Comment (d)). The admissibility of preparatory work is not a well-settled area under international law, and the issue of whether any specific document would be excluded by any particular tribunal would have to be examined on a case-by-case basis. See Restatement (Revised), Foreign Relations Law of the United States (Tent. Draft No. 6 (1985), sec. 325 (comments and reporters' notes). For purposes of this Report, I shall assume that none of the negotiating documents provided to the Senate would be excluded, regardless of whether they were shared with the Soviets at the time of the negotiations.

INTERPRETATION OF THE ABM TREATY

PART FOUR: AN EXAMINATION OF JUDGE SOFAER'S ANALYSIS OF THE NEGOTIATING RECORD

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PART FOUR: AN EXAMINATION OF JUDGE SOFAER'S ANALYSIS OF THE NEGOTIATING RECORD

Background Considerations

I. Introduction

On March 11, I presented Part One of this report, which dealt with the Senate ratification proceedings on this Treaty.[1] In that report, I concluded that the Nixon Administration explicitly told the Senate during the treaty ratification proceedings that the Treaty prohibits the development and testing of mobile/space-based ABMs using exotics. I also concluded that the Senate clearly understood this to be the case at the time it gave its advice and consent to the Treaty and that the evidence of this is compelling beyond a reasonable doubt.

On May 13, the Administration released a new report by Judge Sofaer, the State Department Legal Adviser, dated May 11, which examines the record of the Senate ratification proceedings.[2] The May 11 report contains the material omitted from the original analysis of the Senate ratification proceedings conducted by his office. However, it fails to make a convincing case for its conclusion that the Senate was not provided with a clear meaning of those provisions of the Treaty relating to mobile/spaced-based exotics. I do not agree with Judge Sofaer's conclusion, nor do I accept the State Department's new doctrine that when the Senate gives its advice and consent to a treaty, it is to the treaty that was negotiated, "irrespective of the explanations it is provided."[3]

I believe this new doctrine is totally unacceptable from the perspective of the Senate. If adopted by the Administration, it would inflict serious long-term damage on the institutional relationship between the President and the Congress and have destructive consequences for the conduct of U.S. foreign policy. Unless this doctrine is modified, a reasonably prudent Senate would have to take the following steps:

First, the Senate would have to obtain the negotiating record of the treaty, since the Senate certainly could not trust that executive branch witnesses were accurately representing those documents. Because the negotiating record, including the confidental memos and recommendations of our negotiators, would be the focal point of the Senate debate, the Senate would have to insist that it be made public at the commencement of the ratification debate.

Second, the Senate would have to record each and every understanding it has as to the meaning of a treaty in its resolution of ratification -- including those points on which there is no apparent disagreement between the Senate and the President. This safeguard would be necessary not only to allow the Senate to assure itself that states party to the treaty agreed with its understanding of the treaty, but also to avoid the risk that fifteen years or so later some future Administration might unilaterally conclude that the negotiating record supports a conflicting conclusion.

Senate resolutions of ratification prepared under this doctrine would be so laden that they would sink under their own weight. More fundamentally, they would effectively precipitate a renegotiation with all states party to the treaty since they might well object to the wording employed in stating the Senate's interpretation of the meaning of the treaty.

Unless the new doctrine is significantly modified, a reasonably prudent Senate would have to follow these steps in acting on all treaties that are submitted for its advice and consent, including a possible INF treaty, if the Senate is not to be derelict in exercising its constitutional responsibilities.

I hope that this course of action will not be required. I would much prefer that we return to a method of conducting treaty ratification proceedings wherein the Senate can confidently rely upon the representations of executive branch officials. This approach has served the Nation well for 200 years and I believe it can continue to do so.

In Part Two of my report on the ABM Treaty interpretation issue, which I presented on March 12, I reviewed the record furnished by the State Department of U.S. and Soviet practices and statements during the thirteen year period between signing of the Treaty and the announcement of the Reinterpretation in October 1985.[4] Under both international and domestic law, such evidence may be considered in determining the meaning of the Treaty. Based on the information provided to the Senate to date by the State Department, I found no evidence which contradicted the Senate's original understanding of the meaning of the Treaty. On the contrary, I noted that successive administrations, including the Reagan Administration, had consistently indicated prior to 1985 that the Treaty banned the development and testing of mobile/space-based ABMs using exotics.

On May 14, the State Department provided the Senate with a previously unavailable volume of classified documents bearing on the question of subsequent practice.[5] A preliminary review of this material reveals that the case for the Reinterpretation is substantially weaker than the Administration's previous analysis had indicated. In particular, Soviet statements in March, 1976 during the SALT II negotiations and in May, 1985 in the Standing Consultative Commission unequivocally underscore the Traditional Interpretation. Other documents in this volume dealing with the negotiation in the SCC in 1977-1978 of an Agreed Statement to the ABM Treaty add to my already considerable skepticism that the SDI's proposed Space-Based Kinetic Kill Vehicle (SBKKV) could be developed and tested under the Treaty even if the Reinterpretation were implemented.

On March 13, I presented Part Three of my report, which contained my summary conclusions about the treaty negotiating record and recommendations as to specific steps the Administration should take to resolve this controversy.[6] Based on my review of the documents submitted by the State Department to the Senate on August 12, 1986, I first noted that Judge Sofaer had identified some ambiguities in the negotiating history. However, I emphasized that these ambiguities were not of sufficient magnitude to demonstrate that the Nixon Administration reached one agreement with the Soviets and then presented a different one to the Senate. On the contrary, the negotiating record contains substantial and credible information which indicates that the Soviet Union and the United States agreed that the development and testing of mobile/space-based exotics was banned. I concluded that the preponderance of evidence in the negotiating record supports the Senate's original understanding of the Treaty -- that is, the Traditional Interpretation.

On May 13, the Administration released a new 82-page review by Judge Sofaer of the ABM negotiating record.[7] The new Sofaer report, dated May 11, addresses a number of recently-discovered documents which had not previously been made available to the Senate and presents a substantially revised analysis of the negotiating history. Nonetheless, it reaches the same basic conclusion as in Sofaer's August 6, 1986 memo, which has been available in Room S-407 to Senators and certain staff members since August 12, 1986.[8] With the release of the May 11 report, the Administration declassified Sofaer's analysis along with a number of the memcons and cables from the negotiating record. I am pleased that the Administration also agreed to declassify the report I am submitting today.

Since the August 6 Sofaer memo is the document Senators have had before them for the last nine months, this report will examine that document in considerable detail. I have, however, attached an appendix (Appendix B) which provides some summary observations on the latest Sofaer analysis of the negotiating record.

This report is based on the many hours my staff and I spent in S-407 reviewing the negotiating record. I have been assisted in this review by Robert Bell, a Professional Staff Member on the

Armed Services Committee. Mr. Bell, who was one of the six Senate staff members originally granted access to the documents maintained in S-407, has spent a considerable amount of time since August reviewing this file. In addition, I have been assisted in my analysis of legal and international law issues by two other members of the Committee staff, Andrew Effron and Jeffrey Smith. Mr. Effron and Mr. Smith did not have access to the documents in S-407 but contributed in other respects in the preparation of this report, including my review of the newly-declassified studies.

II. Description of Material

At the outset, it is important to note that the "negotiating record" provided to the Senate by the Department of State consists of a disjointed collection of cables, internal working documents, prepared talking points, memoranda of conversations (memcons), and National Security Decision Memoranda (NSDMs) prepared by or sent to the U.S. SALT I Delegation between August 1971 and May 1972.

There is no single document or set of documents that constitutes an official negotiating history. There is no verbatim transcript of the proceedings. Instead, we have a variety of documents of uneven quality. Other than the Treaty itself, the most authoritative documents in the negotiating record are the NSDMs codifying the official instructions to the U.S. Delegation. These directives were signed by the President and represented the formal, coordinated judgment of the executive branch as to U.S. negotiating objectives and limitations on the authority of the negotiators.

The bulk of this material is comprised of memcons. These memos recorded the drafter's own recollections of meetings or discussions with the Soviets as written down in the hours or days following such exchanges. Some memcons are quite detailed and contain attachments with prepared statements or talking points which were used in meetings with Soviet delegates; others contain nothing more than cryptic comments. As I noted in Part Three, these unilateral memos are the least persuasive evidence of a Treaty's meaning as a matter of international law.[9] These memcons were not "cleared" with the Soviet Union, and with the exception of the Joint Draft Texts of the Treaty, none purport to represent a mutually agreed view or account of the proceedings unless otherwise noted. Nonetheless, this is the record on which the Reagan Administration's decision was primarily based.

These materials simply do not compare in quality to the debates and reports normally relied upon for interpretation of legislation. Nonetheless, the records provided to the Senate contain a significant amount of material bearing on the issue of the development and testing of exotics.

The material submitted to the Senate by the State Department in August, 1986 also contains two recently prepared reports. The first is the August 6, 1986 Sofaer memo previously mentioned. This document is entitled, "Application of the ABM Treaty to Systems and Components Based on Other Physical Principles." This document is not the original memorandum by Sofaer on which the Administration based its Reinterpretation in October 1985, but rather an updated version which was revised by Sofaer at Ambassador Nitze's request to take into account the so-called "FitzGerald Report."

The FitzGerald Report, which was also submitted to the Senate last year, was authored by Col. Charles FitzGerald under a Department of Defense contract in March 1985.[10] Col. FitzGerald, who was a participant in the SALT I negotiations, prepared the report under the auspices of the Systems Planning Corporation (SPC). The FitzGerald Report was written in the form of a history and did not draw explicit conclusions as to the interpretation of the Treaty. Nonetheless, the report offers strong support for the Traditional Interpretation of the Treaty. Judge Sofaer has indicated that he had not read the FitzGerald Report prior to presenting his original opinion in October, 1985.

III. Identification of Key Players

The following U.S. and Soviet negotiators played leading roles in the negotiation of the ABM Treaty and are frequently mentioned in this report:

A. U.S. Negotiators

Gerard C. Smith:	Head of the U.S. Delegation.
Sidney Graybeal:	ACDA Representative; Lead negotiator for Article V.
Raymond L. Garthoff	Executive Secretary to U.S. Delegation, Lead negotiator on Article II and Agreed Statement D.
J. Graham Parsons:	State Department Representative
Lt.Gen. Royal Allison:	JCS Representative
Paul Nitze:	Representative of the Secretary of Defense
Harold Brown:	Delegate-at-Large
John Rhinelander:	Legal Adviser

B. Soviet Negotiators

Ambassador Semenov:	Head of Soviet Delegation
Victor Karpov:	Ministry of Foreign Affairs (MFA) Representative; Lead negotiator for Article V.
Oleg Grinevsky:	MFA Representative; Lead negotiator on Article II, Agreed Statement D, and Article III.
N.S. Kishilov	MFA Representative; Negotiator on Article II, Agreed Statement D and Article III.
Academician Shchukin	Scientific adviser to Soviet Delegation.
Lt. Gen. K.A. Trusov	A senior Ministry of Defense (MOD) representative.

IV. Situation as of August, 1971

From the start of SALT I in November 1969 until the summer of 1971, the question of futuristic ABM systems had not been on the table. However, the issue was raised on July 2, 1971, when the U.S. Delegation was instructed, pursuant to National Security Decision Memorandum (NSDM) 117, that the treaty "should make clear that any systems for rendering ineffective strategic ballistic missiles or their components in flight trajectory are prohibited unless permitted by this agreement (emphasis added).[11]

The only "permitted" systems listed in the NSDM were then-current systems--ABM missiles, ABM launchers, ABM radars, and other large phased-array radars. As a result, the directive seemed to call for a ban on the deployment, and perhaps even the development, of all future ABM systems or components other than these three specific types.

Once this was recognized, three different positions developed within the Administration. One faction favored no limitations whatsoever on "exotics"--whether mobile/space-based or fixed, land-based. A second group urged a ban on the deployment of any "exotics." A third faction agreed with a ban on deployment of "exotic" ABM components, but argued there should be an exemption for some related adjuncts, such as sensors.

The issue was resolved in NSDM 127.[12] This directive represented a compromise between the various views represented within the government on the exotics issue. With respect to fixed, land-based exotics, deployment would be banned, but development and testing would be allowed; for mobile/space-based exotics, development, testing, and deployment would be prohibited.

JUDGE SOFAER'S ANALYSIS AND THE NEGOTIATING DOCUMENTS

In this part of my report, I will first summarize Judge Sofaer's analysis of key developments and issues in the negotiating history. I will then assess his analysis on each point in light of my own review of the negotiating documents that were submitted to the Senate by the Department of State last August 12.

I. The negotiations concerning mobile/space-based exotics under Article V(1)

A. The President's August 12, 1971 instructions to the negotiators concerning mobile space-based exotics

1. Sofaer finds that the negotiators were instructed to achieve an agreement that embodied the "restrictive" view of the treaty, banning development, testing, or deployment of mobile/space-based ABMs using exotics.

In his analysis, Sofaer takes note of the transmission of NSDM 127 to the U.S. Delegation in Helsinki:[13]

> [O]n August 12, 1971, the U.S. Government issued the following instruction to its ABM negotiators:
>
> **[NSDM 127]**
>
> 3. The agreement should contain a provision whereby neither side shall deploy ABM systems using devices other than ABM interceptor missiles, ABM launchers, or ABM radars to perform the function of these components. (This paragraph along with that in the next paragraph, should not prohibit the development and testing of future ABM components in a fixed, land-based mode.)
>
> 4. The agreement should contain a provision whereby neither party shall develop, produce, test, or deploy:

(a) sea-based, air-based, space-based, or mobile land-based ABM launchers, ABM missiles, or ABM radars;

(b) ABM components other than ABM interceptor missiles, ABM launchers, or ABM radars to perform the functions of these components.

2. *The negotiating record validates Sofaer's finding with regard to the instruction*.

As noted above, the internal U.S. dispute in the summer of 1971 over the question of how the ABM Treaty should apply to exotics was resolved by President Nixon on August ~~9~~ 12, 1971, in NSDM 127. Sofaer accurately notes that the August 12 cable transmitting this decision to the Delegation instructed the U.S. negotiators to reach two separate outcomes on this issue, as reflected in paragraphs 3 and 4 of the directive.

In effect, the negotiators were instructed to differentiate exotics ABMs depending on their basing modes. For exotics that were fixed, land-based, only deployment would be prohibited (Paragraph 3). For "exotics" that were mobile/space-based, however, development, testing, and deployment was to be banned (Paragraph 4). This dichotomy reflected the consensus of the time within the U.S. Government and scientific community that there was a greater potential for laser and other futuristic research evolving into a technology that could be used in the development of ABMs that were ground-based, rather than space-based or air-based.

In sum, the negotiating record supports Sofaer's conclusion that the Delegation was ordered by the President to obtain an agreement that would have the effect of banning the development and testing of mobile/space-based exotics.

B. The August 17, 1971 U.S. proposal

1. Sofaer finds that the proposal presented by the U.S. negotiators pursuant to NSDM 127 differentiated between fixed, land-based exotics and mobile/space-based exotics and that it contained a comprehensive ban on development, testing, and deployment of the latter, while only prohibiting the deployment of the former.

In his analysis, Sofaer takes note of the initial presentation of the new U.S. position on exotics:[14]

> On August 17, pursuant to NSDM 127, the U.S. delegation proposed two new sections in the draft of Article 6. Article 6(1) sought to ban the deployment of substitute "devices" for ABM systems:
>
> > **[U.S. Proposal for New Article 6(1)]**
> >
> > Each Party undertakes not to deploy ABM systems using devices other than ABM interceptor missiles, ABM launchers, or ABM radars to perform the functions of these components.
>
> Article 6(2) sought to prohibit development, production, testing, or deployment of current ABM components based in any mode other than fixed, land-based, as well as of all substitute "devices":
>
> > **[U.S. Proposal for New Article 6(2)]**
> >
> > Each Party undertakes not to develop or produce for or test or deploy in sea-based, air-based, space-based, or mobile land-based modes:
> > -- ABM interceptor missiles,
> > -- ABM launchers,
> > -- ABM radars or
> > -- other devices to perform the functions of these components. (emphasis in original)

2. The negotiating record validates Sofaer's finding with regard to this proposal.

a. The U.S. Proposal

As Sofaer notes, five days after receiving NSDM 127, Ambassador Smith presented the Soviet negotiators with the following proposal which differentiated between fixed, land-based exotics and mobile/spaced exotics:[15]

INITIAL U.S. PROPOSAL ON EXOTICS

> 1. Each Party undertakes not to deploy ABM systems using devices other than ABM interceptor missiles, ABM launchers, or ABM radars to perform the functions of these components.
>
> 2. Each Party undertakes not to develop or produce for or test or deploy in sea-based, air-based or mobile land-based modes,
> -- ABM interceptor missiles
> -- ABM launchers
> -- ABM radars, or
> -- other devices to perform the functions of these components.

The first paragraph of the U.S. proposal, which was ultimately included in the Treaty in modified form as Agreed Statement D, implemented Paragraph 3 of NSDM 127, which dealt exclusively with fixed, land-based exotics. Paragraph 2 of the proposal -- which included a total prohibition on the development, testing and deployment of mobile/space-based ABMs using "other devices" to perform the functions of interceptor missiles, launchers, and radar (i.e., exotics) -- ultimately emerged in modified form as Article V(1).

b. The U.S. put great emphasis on restricting exotics

During the initial presentation of the new U.S. proposal, the U.S. Delegation took great pains to emphasize that the Treaty should apply to all types of future ABM systems and components, including exotics. For example, on August 17, Ambassador Smith stated, "the Agreement would apply to all types of ABM systems, including possible future types of ABM systems, and not only to ABM systems employing ABM interceptor missiles, ABM launchers, and ABM radars. We believe that the Agreement should reflect this explicitly."[16] Sofaer's analysis takes note of this statement by Smith. Later that day, Harold Brown told Academician Shchukin that the U.S. proposal would cover "future kinds of systems, not using the usual components."[17] At an August 27 meeting, Ambassador Smith warned that "if such future systems were not covered, uncertainties would increase, and the result would be an arms race in other ABM systems with the opposite result from that which we sought in an arms control agreement."[18]

c. Harold Brown's discussion of exotics

In addition to the general comments on coverage of future systems, the specific issue of development of exotics was expressly addressed in remarks presented by Harold Brown on August 27. Brown's comments are of particular importance, because his remarks have been cited repeatedly by the United States as an authoritative U.S. statement on the issue of what precisely constitutes "development" under the ABM Treaty. His text, which had been prepared carefully in advance with the specific objective of providing the Soviets with a definitive U.S. statement in response to questions raised by Academician Shchukin, said the following with respect to the new U.S. draft proposal on exotics, which was then denominated as U.S. Article 6:[19]

> With regard to Paragraph 1 of Article 6, Academician Shchukin asked what is meant by "ABM systems using devices other than ABM interceptor missiles, ABM launchers, or ABM radars to perform the functions of these components." By this we refer to any present or future system which employs other means or devices to perform the functions of interceptor missiles, launchers, or radars in rendering ineffective strategic ballistic missiles or their components in flight trajectory. Our objective in this Article 6 is to establish a commitment that neither side will deploy ABM systems--including possible future types of ABM systems--which might not use ABM interceptor missiles, ABM launchers, or ABM radars. Surely we would not want an agreement which would permit either side to deploy an ABM system both thick and nationwide simply because the system did not use interceptors, launchers or radars. Paragraph 1 of Article 6 is an undertaking not to do so, thus preventing systems or components from using such new concepts from being used to circumvent the ABM agreement. Academician Shchukin noted that paragraphs 2 and 3 of Article 6, as well as paragraph 2 of Article 2 of the U.S. text, refer to limitations on "development". In this connection, he asked for our views on the meaning of "development" and the practicality of limitations on development. By "development" we have in mind that stage in the evolution of a weapon system which follows research (in research we include the activities of conceptual design and laboratory testing) and which precedes full-scale testing. The development stage, though often overlapping with research, is usually associated with the construction and testing of one or more prototypes of the weapon system or its major components. In our view, it is entirely logical and practical to prohibit the development--in this sense--of those systems whose testing and deployment are prohibited. (emphasis added)

Sofaer cites this statement by Brown, but he does not mention Brown's comments as to the practicality of including a prohibition on the development of any mobile/space-based ABMs covered by U.S. Article 6(2), including exotics (i.e, the underlined section cited above).

d. Other U.S. Statements Concerning Exotics

In other meetings prior to September 15th, U.S. negotiators continued to hammer at this theme in their meetings with the Soviet side, stressing the necessity of not leaving open a loophole in the treaty restrictions which could be exploited through the development and deployment of exotics. On September 3, Ambassador Smith declared that a "fundamental question before the sides is whether we are trying to limit ABM systems or just ABM interceptors, launchers and radars," adding that the Treaty would be a "cruel illusion" if exotics were left out.[20] This statement is also noted by Sofaer.

During a meeting with Karpov on September 8, Graybeal stressed that the proposed U.S. Article was intended "to address future ABM systems that would utilize components or devices other than launchers, interceptor missiles, or radars."[21] When asked why limitations on exotics could not be left for the SCC to negotiate, Graybeal replied that "an operative article indicating clearly the obligations with regard to improvement of existing ABM systems and with regard to future systems would be far more useful than merely referring these questions to the Standing Commission."[22]

This statement, in particular, could have left no doubt on the Soviet side that the U.S. proposal to ban development, testing, and deployment of mobile/space-based systems applied _not only_ to new versions of the then-current fixed, land-based ABM components, _but also_ to future systems using components or devices other than these three elements. In this statement, which is not discussed by Sofaer, Graybeal clearly distinguished between "future systems" and future versions of then-current ABMs -- a distinction which goes to the heart of Sofaer's hypothesis concerning a crucial discussion that followed between Graybeal and Karpov on September 15.

e. Summary

The U.S. negotiators were consistent in forcefully advocating the position set forth in their instructions, as embodied in the U.S. proposal, that development, testing and deployment of mobile/spaced-based ABM exotics should be prohibited; development and testing (but not deployment) of fixed, land-based exotics could go forward. Sofaer agrees that the U.S. Delegation faithfully presented this proposal consistent with its original instructions, though he fails to point out that the U.S. side explicitly confirmed that its proposal included not only future versions of then-current ABM components but also futuristic or exotic ABM components.

C. Initial Soviet reaction to the U.S. proposal in August and early September, 1971

1. Sofaer finds that the Soviet delegation categorically rejected the U.S. proposals limiting exotics

Sofaer contends that Academician Shchukin's initial response to the new U.S. proposal, as stated by the Soviet delegate in response to a question by Harold Brown on August 17 (the day the new U.S. proposal was first presented), was indicative of the position that the Soviet negotiators would repeat for the next five months. As characterized by Sofaer, Shchukin told Brown "that the Parties should not attempt to deal with future possibilities."[23]

Sofaer supports his assertion by citing a number of Soviet statements during the following four weeks critical of the new U.S. proposal, including statements by Shchukin on August 24, Semenov on August 27, Trusov on August 31 and September 3, Karpov on September 8 and 13, and Fedenko on these same dates. Sofaer's presentation of these statements is accurate, but incomplete and misleading.

2. Contrary to Sofaer's claim, the negotiating record demonstrates that the initial Soviet response left open the potential for agreeing on limitations on ABMs using exotics.

As noted above, Sofaer cites a number of negative Soviet statements about the U.S. proposal. However, he fails to take note of other Soviet statements suggesting that the U.S. proposal might be accepted if the U.S. Delegation would disclose details about U.S. futuristic systems. Moreover, in contending that the U.S. proposal was categorically rejected by the Soviet side, Sofaer fails to consider various tactical explanations for the Soviets' initial decision to hold the proposal at arms length. These include their desire to probe for secrets about U.S. research, their interest in obtaining clarifying language in order to assess whether the U.S. proposal would unduly restrict their air defense program, and their need to stall for time pending receipt of instructions from Moscow. Each of these aspects of the initial Soviet response will be considered below.

a. Probing for U.S. Secrets

Rather than immediately and categorically rejecting the U.S. proposal--as Sofaer claims--the Soviets in fact took a far less prejudicial position. For example, Sofaer neglects to mention the official response of the head of the Soviet Delegation, Ambassador Semenov. Following Ambassador Smith's presentation of the new U.S. position, Semenov replied that "the proposal of the U.S. side on Article 6 would be carefully studied."[24]

Indeed, Sofaer fails to acknowledge that the Soviet side repeatedly raised the possibility of favorable consideration of the U.S. position if the United States would provide detailed information on the specific exotic ABM systems it had in mind. In the days immediately following the initial U.S. presentation of the new proposal on exotics, members of the Soviet delegation all appeared to be working from a script designed to discover as much as possible about U.S. programs and capabilities in this highly classified area.

A case in point is the August 17 discussion between Academician Shchukin, Harold Brown, and Paul Nitze. As noted above, Sofaer argues that Shchukin's comments at this informal meeting were representative of the negative Soviet reaction to the U.S. proposal. However, Sofaer's characterization of Shchukin's remarks fundamentally misrepresents what Shchukin actually said. Contrary to Sofaer's claim, Shchukin did not indicate (in Sofaer's words) "that the parties should not attempt to deal with future possibilities." What he did say was that "there might be some difficulty in getting the politicians and diplomats to consider this problem, because if one could not point to specific systems in or near development status, the politicians and diplomats would probably not be interested in future possibilities."[25]

Sofaer also fails to mention that while Shchukin downplayed the importance of agreeing to restrictions in this area, he also said that "it might be all right to include such a ban." In fact, Shchukin appeared to suggest that such an outcome was certainly conceivable by commenting: "The wording and terminology covering such things would have to be determined in the end by the diplomats, advised by the rest of us." This statement, too, is omitted by Sofaer. Finally, Sofaer fails to note the interesting remark by Nitze at this same meeting that "Shchukin himself had raised the possibility of future kinds of systems in informal conversations."[26]

On August 24, Shchukin probed further on the new U.S. proposal, saying: "This is an entirely new provision and the Soviet side is not clear on its meaning and substance. What did the U.S. have in mind in speaking of such ABM systems, and such devices?"[27] Sofaer notes this question by Shchukin, but he fails to mention Shchukin's two succeeding questions about U.S. Article 6(2): First, Shchukin asked: "Would it be possible for the U.S. to clarify its understanding of the notion of 'development' and of the practical application of limitations at this stage?" Second, he inquired as to how the United States would propose to verify such a ban "if it were accepted by the sides." (emphasis added) None of these three questions reflects a categorical rejection of the U.S. proposal, as Sofaer maintains.

At an informal meeting with two U.S. delegates on August 31, General Trusov firmly opposed trying to limit in the Treaty what he termed "undefined ideas", a criticism which Sofaer cites in some detail.[28] However, Sofaer omits Trusov's request that the U.S. side provide him an example of "what we had in mind when we spoke of an ABM system which does not include launchers, interceptor missiles and radars."

It is also interesting that Sofaer cites -- but fails to address the full implication of -- another statement by Trusov at this meeting. According to the memcon prepared by the U.S. side, Trusov _conceded_ that "development, testing and deployment of such future systems _would be observed_ by our national means of verification and the review process could take care of _the necessary prohibition or limitation_."[29] (emphasis added)

In other words, Trusov did not claim that it would be impossible to detect the development or testing of mobile/spaced-based exotics. Nor did he claim that it would be impossible to negotiate limitations in such areas. Rather, he was simply arguing that the task of negotiating such limitations should be left to a succeeding phase via the SCC rather than be taken on during the treaty negotiations themselves. It is interesting to note that this is the same position the Soviets took initially with regard to limitations on the deployment of fixed, land-based exotics -- a position the U.S. Delegation eventually overcame, just as it overcame the initial Soviet position that the question of limiting the development and testing of mobile/space-based exotics should be deferred until after the Treaty was signed.

Three days later, Trusov made a major intervention on the subject of exotics at a mini-plenary session. Trusov declared that "the Soviet side does not believe it is correct to include such limitations."[30] However, he also again dangled the "carrot" of possible Soviet agreement if the U.S. Delegation would be more specific. Trusov declared: "If such systems exist, then they should be named and the subject would be made more clear and could become the subject for further discussion." (emphasis added) This statement is not cited by Sofaer.

Karpov reinforced this theme on September 8, saying that "if the U.S. side believes that such systems exist, then it should identify them and name them so that the possibilities to limit them could become clear."[31] Colonel Fedenko--another Soviet MOD representative--also weighed in, saying at another meeting that day that "these 'other means' should be identified if they are known at the present time."[32] Sofaer cites Fedenko's comments at this meeting that were critical of the U.S. proposal, but he omits the Soviet delegate's concluding--and far less categorical statement--that "the Soviet side realized the U.S. side had required a long time to arrive at its formulation of this paragraph and consequently, the Soviet side would require some time to understand the need for including such a paragraph."[33]

Sofaer also fails to mention Fedenko's statement five days later that:

> [I]f the U.S. side could define what it was talking about then national means could probably verify such activities because presumably it would be mandatory to test such conceptual devices. The Soviet side would then be in a position to determine whether such systems should be in an ABM Treaty.[34]

Even more damaging, though, is Sofaer's surprising failure to discuss--or even take note of--a crucial portion of the August 12 instructions from President Nixon to the U.S. negotiators which outlined the basic strategy for handling the issue of exotics. This portion of National Security Directive Memorandum 127, denominated as Paragraph 5, read as follows:[35]

> [Paragraph 5, NSDM 127]
>
> In presenting this position, the Delegation should not invite a detailed negotiation or discussion of future ABM systems. Our objective is to reach agreement on the broad principle that the agreement should not be interpreted in such a way that either side could circumvent its provisions through future ABM systems or components. We intend to handle any problems that may arise through the Joint Commission and the formal review procedures.

This key instruction helps explain the negotiating environment which produced a final text on mobile/space based ABMs that is less explicit with respect to exotics than originally proposed by the U.S. Delegation. Paragraph 5 of NSDM 127 reflected the extreme sensitivity within the U.S. Government about the dangers of revealing too much information about highly-classified U.S. military research then being conducted in such areas as lasers and particle-beam weapons.

The initial Soviet response to the U.S. offer on exotics placed the U.S. Delegation in a difficult position. It was under strict instructions not to accede to the Soviets' requests that they provide details of the "other devices" we had in mind. As Graybeal said in an interview, "I knew if I talked details I was going to catch hell."[36] At the same time, the U.S. Delegation had to ensure that the ban on mobile ABM systems and components left no loopholes for exotics. In this situation, NSDM 127 instructed the Delegation to hold firm in refusing to divulge details of our own programs, even if that meant settling for a provision on exotics less explicit than the United States had originally preferred. In short, NSDM 127 pushed the Delegation towards a compromise outcome.

b. Protecting Soviet air defenses

As Soviet efforts to learn the details of futuristic U.S. programs were rebuffed, the thrust of Soviet commentary on the U.S. proposal began to shift, and another--but equally parochical--Soviet interest came to the fore. By early September, it became clear that a principal reason the Soviets were concerned about U.S. Article 6 was that the language dealing with "other devices to perform the functions" of ABM components was in their view so broad that the United States might try to apply it to elements of the Soviet air defense network, especially surface-to-air missiles (SAMs) and air defense radars.

That the Soviets were insistent that the ABM Treaty not limit their air defenses was not a new discovery for the U.S.

Delegation. Deep-rooted Soviet concern on this point had been raised early in SALT I and it remained a central stumbling block in negotiations that were continuing on other provisions of the accord, including Article II, which defined the scope of the Treaty, and the U.S. proposal for Article VI(a), which would bar any upgrades of non-ABM capable missiles, launchers or radars to give them an ABM capability.[37] Indeed, the level of Soviet anxiety on the air defense issue was so pronounced that Harold Brown described it at a later mini-plenary as an "aversion" and Paul Nitze felt obliged to assure Shchukin that the United States "fully understood" the Soviets' "sensitivity" on this score.[38]

Yet, surprisingly, the words "air defense" do not appear anywhere in Sofaer's memo. There is no indication that he was cognizant of the role that this Soviet concern played in the negative Soviet reaction to the original draft of the new U.S. proposal on "exotic" ABM systems, despite the crucial role that the issue of air defenses played in the overall context of these discussions.

c. Stalling for time

The Soviets' initial response also apparently reflected the fact that the new U.S. proposals on exotics caught the Soviets off guard -- apoint which was underscored in interviews with a number of the former negotiators. Graybeal, for example, stated that Karpov apparently did not receive instructions as to how to reply until later in the summer.[39] In Graybeal's view, once Moscow provided guidance on how to proceed, the two sides rather quickly were able to conclude an understanding on mobile/space-based "exotics", though differences on fixed, land-based exotics (which were further along in both the U.S. and Soviet research programs) continued to tie up the negotiations for months.

D. U.S. and Soviet offers and counteroffers on exotics during the first two weeks of September 1971

1. Sofaer maintains the Soviet side gave no indication it was prepared to agree that the restrictions under Article V(1) on mobile/space-based ABMs should extend to exotic systems.

In his discussion of a key U.S./Soviet discussion of Articles 2 and 6 of the U.S. draft during a September 8 meeting of the Karpov-Graybeal Ad Hoc Committee, Sofaer cites a number of Soviet statements critical of the U.S. texts and concludes, "The statements of Karpov and Graybeal make clear that Soviet opposition to dealing with unknown 'devices' related, not only to the proposed regulation of such substitute 'devices' in fixed, land-based systems under Article 6(1), but also to the regulation of such 'devices' in mobile (including space-based) systems in Article 6(2)."[40]

Similarly, with reference to another Karpov-Graybeal exchange on this subject on September 13, Sofaer finds, "Thus, while the U.S. wanted to prohibit testing, development, and deployment of any 'device' that could be used to substitute for an ABM mobile system or component, the Soviets wanted to apply these prohibitions only to existing components, which they contemplated would be specially constructed for such ABM systems."[41]

In short, Sofaer sees no indication of a possible Soviet intent to compromise on the issue of including exotic systems under the restrictions of Article V(1) during the two weeks precedent to the crucial September 15 meeting.

2. The negotiating record demonstrates that the Soviets declared that Article V had a broader scope than that of Article II, which the Soviets were then limiting to existing ABM components

Once it became evident that the negotiations over the new U.S. proposal on exotics were going to be difficult, the two sides agreed that the matter should be referred to an ad hoc SALT I sub-panel, headed on the Soviet side by Victor Karpov and, on the U.S. side, led by Sidney Graybeal. The mandate of the Graybeal-Karpov Ad Hoc Committee in August and September of 1971 included more than the issue of exotics. It had also been assigned the responsibility for resolving differences over the definitional provisions, which were contained in Article II of the Treaty.

From an early stage in the negotiations, both sides had wanted Article II to define the ABM systems and components that would be limited under the Treaty, but they disagreed on the formulation and scope of this article. The Soviets initial approach, which they followed until December 1971, would have limited the ABM components defined in Article II to those ABM components then in use; i.e., ABM missiles, launchers and radars. The Soviets described this as an "obligational" approach -- that is, the article would have contained a precise list of the systems covered by the obligations of the Treaty.[42] The U.S. side put forward what is described as a "definitional" approach wherein Article II would provide definitions of terms used throughout the Treaty.

Despite their initial divergence in approach, the two sides agreed that their respective texts for Article II, standing alone, created no obligations under the Treaty. For example, on September 2, Karpov said: "It seems clear the Soviet version [of Article II] precisely expresses no obligations, but the systems that should be covered by the obligations."[43] At another meeting of the subpanel, Graybeal agreed, noting that Article II "is not intended to represent a list of obligations to be assumed."[44] During the same meeting, Graybeal stated that "neither the U.S. nor the Soviet versions of this paragraph set forth obligations to be assumed."[45]

With this background in mind, a September 2 statement by Karpov pointing to a key distinction between Article II and Article V is particularly significant. During a discussion of Article II, Graybeal asked Karpov if the obligations contained throughout the Treaty would apply only to the ABM systems and components listed in Article II of the Soviet draft. In other words, would the ban on the development, testing, or deployment of mobile/space-based ABMS in Article V(1) apply exclusively to ABM missiles, launchers and radars?

Karpov replied that the "fundamental basic obligations which deal with numerical limitations in the Soviet Article III would be applied to these systems," but added that that "does not mean that there will not be other obligations listed in the treaty which will cover other systems."[46] (emphasis added) He then specifically declared that Article V was one such "other" article. In short, Karpov distinguished between, on the one hand, those provisions in the Treaty which dealt with "numerical" limitations (e.g., how many ABMs could be deployed) and would therefore deal narrowly only with existing types of ABM missiles, launchers and radars and, on the other hand, those provisions that dealt with "other obligations" (e.g., qualitative issues, such as a flat ban on the development, testing, or deployment of certain types of ABMs) and would therefore have a broader scope. Article V, he confirmed, fell into the later category.

Sofaer concedes that this important Karpov statement is consistent with the traditional interpretation, saying that the Karpov statement "provides limited support for the position that the Soviets would have accepted regulation of any ABM system with substitute devices for the usual components."[47] However, he makes this concession almost in passing and never reconciles it with his basic thesis that the Soviets never agreed to include exotics under the coverage of Article V.

E. U.S. and Soviet decisions on Article V(1) between September 15-24, 1971

1. Sofaer finds that the parties failed to agree on limiting exotics in this Article.

In a crucial exchange on September 15, 1971, Karpov and Graybeal discussed proposals for limiting exotics. Sofaer takes the position that any agreement reached at that time on Article V(1) dealt only with future versions of then-existing ABM components, and not with exotics. In Sofaer's view, the discussions during the September 15 meeting "fail to reflect Soviet acceptance of regulation of 'other devices.' Rather, they indicate a Soviet willingness to drop language from the Soviet draft Article V(I), to which the U.S. had objected on grounds unrelated to the 'other devices' issue, in exchange for agreement by the U.S. to drop the language extending the Treaty's regulation to 'other devices."[48]

2. The negotiating record shows that the parties explicitly agreed that the restrictions on testing and deployment of mobile/space-based ABMs applied to any type of present or future components of ABM systems, and this included exotics.

a. Background: The Soviet counter-offer and U.S. response

During the discussion of the U.S. proposal at the September 8 meeting, Karpov presented a proposal aimed, *inter alia*, at prohibiting testing of mobile/space-based systems, a proposal which the memcon of that meeting describes as a Soviet attempt "to merge the language" of the two sides' respective texts:[49]

> Each Party undertakes not to construct, not to test and not to deploy mobile land-based, sea-based, air-based or space-based ABM systems and their components, specially constructed for such systems.

Graybeal asked whether the language of the Soviet working paper covered devices other than ABM launchers, interceptors, and radars, ard whether transportable systems or components would be considered as mobile systems or components. Karpov initiated a lengthy discussion related to transportable systems, but did not address that aspect of the question dealing with devices other than missiles, launchers, and radar.

At the next meeting of the subpanel on September 13, Karpov proposed a new text for Article V which incorporated a few changes in paragraph (2) but left paragraph (1) unchanged from the text he had proposed on September 8. In a statement not mentioned by Sofaer, Karpov said that the Soviet proposal for Article V "took into account the wishes of the U.S. side."[50]

Graybeal responded by presenting a new U.S. proposal on mobile/space-based exotics, which read as follows:[51]

> Each Party undertakes not to develop, test or deploy sea-based, air-based, space-based, or mobile land-based ABM interceptor missiles, ABM launchers, ABM radars, or other devices for performing the functions of these components.

Graybeal and Karpov then spent the rest of the meeting discussing Article II. Nonetheless, at the close of the meeting they agreed that the negotiations on Article V(1) had progressed the stage that a special meeting, with only two officials from each side present, would be "useful."[52]

b. The September 15 Karpov-Graybeal exchange

To recap, this decisive meeting began with the following respective Soviet and U.S. texts for what became Article V(1) of the Treaty on the table:

Proposed Soviet Text For Article V(1)

> Each Party undertakes not to construct, not to test and not to deploy mobile land-based, sea-based, air-based or space-based ABM systems and their components, specially constructed for such systems.

Proposed U.S. Text For Article V(1)

> Each Party undertakes not to develop, test or deploy sea-based, air-based, space-based, or mobile land-based ABM interceptor missiles, ABM launchers, ABM radars, or other devices for performing the functions of these components.

The U.S. memcon of the meeting provides the following account of the events that then transpired:[53]

> Karpov argued that the new formulation [of the Soviet text] ... obviates the requirement for the phrase "other devices for performing the functions of these components" appearing at the end of [the U.S. text] ... The Soviets were proposing to eliminate specific listing of ABM system components (launchers, interceptors, and radars) and substitute the word "components" (using the literal Russian word "komponenty") for this instead of the word for "components" ("sredstva") used in Article 2 when referring to launchers, interceptors or radars. Karpov agreed with Graybeal's interpretation that the Soviet text meant "any type of present or future components" of ABM systems. Karpov said they would give favorable consideration to Graybeal's suggestion that the phrase "specially constructed for such systems" be dropped from the Soviet wording...Graybeal said he would take the new Soviet formulation into consideration and refer it to the U.S. Delegation. It was agreed that paragraph 1 of U.S. Article 6 [i.e., the U.S. proposal to prohibit the deployment of fixed, land-based exotics] would remain bracketed as a U.S. proposal. (emphasis added)

Several points from this account deserve emphasis. First, and most importantly, Karpov --the senior Soviet delegate tasked with negotiating an agreement on this provision-- provided a clear verbal confirmation that the United States would be correct in interpreting the words in the new Soviet proposal as applying to "any type of present or future components" of ABM systems. The memcon presents the words underlined above in quotation marks, indicating that this was a verbatim account of the words actually spoken by Graybeal and confirmed by Karpov. In this regard, it is important to note that the plain meaning of the words "any type" is precisely that; i.e., all types, not some types.

Second, Karpov's statement was not made casually or in an off-hand manner. Rather, he made the statement expressly to confirm a specific interpretation of a proposed compromise on this issue -- a compromise which he believed would resolve the issue of the Treaty's applicability to mobile/space-based exotics. To repeat, this was not an idle observation offered by a junior Soviet delegate at a cocktail party; on the contrary, it was an authoritative statement made by the senior Soviet official handling this matter at a formal negotiating session that had been called for the express purpose of concluding a final deal on this issue.

The 1985 FitzGerald report amplifies on the account in the memcon and provides an explanation of two working papers which are attached to the memcon of the September 15 meeting which was submitted to the Senate last August. The FitzGerald report notes that after Karpov confirmed Graybeal's interpretation of the meaning and effect of the Soviet text, Graybeal put forward two "alternatives" -- either of which he said could be selected by the two sides as representing the end product of the six meetings of the Ad Hoc Committee.

Alternative 1, including the original footnotes and parentheticals, reads as follows:[54]

> Each Party undertakes not to develop, test, or deploy sea-based, air-based, space-based, or mobile land-based ABM interceptor missiles, ABM launchers, [or] ABM radars [or other devices for performing the functions of these components.][specially constructed for such systems.]

This "alternative" would have reflected the position of the two sides before the September 15 discussion; i.e., with a basic disagreement remaining as to which of the two bracketed phrases to include -- the U.S.-proposed text, "or other devices for performing the functions of these components"; or the Soviet-proposed text, "specially constructed for such systems". In short, Alternative 1 would have reflected an acknowledgement that the parties had ended the round unable to agree on this issue.

Graybeal's second alternative read as follows:[55]

> Each Party undertakes not to develop, test, or deploy sea-based, air-based, space-based, or mobile land-based ABM systems or any components therefor. (Emphasis added).

Graybeal's use of the words "or any components therefor" was expressly intended by him to make explicit his agreement with Karpov that the provision covered, literally, any type of present or future component -- that is, all types of future components, including exotics.[56] In short, Alternative 2 embodied the explicit understanding between Karpov and Graybeal that all future ABM components would be covered under the prohibition.

The September 15 memcon does not indicate whether Karpov chose between these two alternatives at the meeting. However, the comment in the memcon that "Karpov said they would give favorable consideration to Graybeal's suggestion that the phrase 'specially constructed for such systems' be dropped from the Soviet wording" can be read as evidence that Karpov was inclined to accept Alternative 2, since this phrase was bracketed in Alternative 1. With this Soviet concession in hand, Graybeal then said -- as noted in the memcon -- that "he would take the new Soviet formulation into consideration and refer it to the U.S. Delegation."

Thus at the close of this important meeting, the question for the American side was whether Alternative 2 -- which incorporated both the Soviet concession on "specially constructed" and Karpov's commitment that the text applied to "any type of present or future ABM components" -- satisfied the delegation's instructions as contained in National Security Decision Memorandum 127. In short, did this text provide for a ban on the development and testing of mobile/space-based exotics even though it did not contain the explicit language on "other devices"?

For the Soviets, the question was whether Alternative 2 was acceptable in the context, first, of Karpov's assurance that this text would be read by the Soviet Union as applying to future ABM components and, second, of Karpov's agreement to delete wording which their side had previously insisted upon (i.e., the wording on "specially constructed").

c. The Soviets accept Alternative 2

On September 17, the Soviet side accepted Alternative 2 at a meeting of the U.S./Soviet Special Working Group, which was tasked with drafting a Joint Draft Text (JDT) of the Treaty.[57] A U.S. proposal to make a technical correction in the provision by changing the words "or any components therefor" in Alternative 2 to read "or their components" was accepted by the Soviets on September 22. As a result, the mutually agreed U.S./Soviet Joint Draft Text (JDT) of September 23, 1971 read as follows:[58]

> Each Party undertakes not to develop, test, or deploy sea-based, air-based, space-based, or mobile land-based ABM systems or their components.

d. The U.S. Delegation advises Washington of the Article V(1) agreement on exotics.

On September 24, the U.S. Delegation reported to Washington in its end-of-round cable that the text of the proposal for U.S. Article 6(2) "including components for future ABM systems which are not fixed and land-based...was agreed ad referendum."[59] To repeat, the U.S. Delegation closed out this round of the negotiations by formally reporting to Washington that it had reached agreement with the Soviets that the development, testing, or deployment of mobile/space-based ABM systems or components, "including components for future ABM systems", would be banned.

There is thus a clear line from the initial U.S. proposal on exotics on August 17 through the September 15 Karpov-Graybeal exchange to the formal report of the delegation on September 24 that is consistent with the Traditional interpretation of the treaty (i.e., a prohibition on the development and testing of all mobile/space-based ABMs, including those using exotics). The negotiating record reveals no dissent as to this outcome from within the Delegation, nor is there any evidence in this time frame that Washington expressed any concern or doubt as to the fact that the wording of this provision satisfied the instructions to the negotiators in National Security Decision Memorandum 127.

The absence of any dissenting views in the negotiating record is particularly telling in view of the manner in which the U.S. Delegation was organized. Ambassador Smith has pointed out that each government agency had its representatives on the Delegation, producing a number of separate "groups" within the team.[60] Each group kept its own checklist of the negotiating instructions, and a particular item would be crossed off only after agreement was reached among all groups. Smith has characterized this process as extremely competitive, in the nature of a "continuous audit." In his view, this "built-in" system of checks and balances meant that if there had been any significant disagreement as to what had been negotiated, that dissent would have "jumped right out" of the negotiating record.

3. Sofaer's reinterpretation of the September 15 Graybeal/Karpov exchange

Sofaer has raised a number of challenges to the traditional view of the September 15 Graybeal/Karpov understanding. These are discussed below.

a. Meaning of the word "components"

Sofaer's case for the reinterpretation of the ABM Treaty rests in large measure on the hypothesis that Karpov did not mean what he appeared to say on September 15, 1971 -- that he in effect uttered an imprecision. Sofaer contends that Karpov did not intend to agree that *all* types of future components of ABM systems would be covered by Article V(1), but rather only *some* types. Specifically, Sofaer argues that Karpov was only agreeing that future versions or follow-on generations of *then-current* ABM components (i.e., ABM missiles, launchers and radars) would be subject to this provision. To illustrate, this would mean that the Soviet Union could not develop, test or deploy in a mobile/space-based mode the ABM missiles, launchers, or radars *then-deployed* around Moscow, nor could it develop, test or deploy a *future* version of any of these three fixed, land-based ABM components in any of these mobile basing modes, but it could develop and test all mobile/space-based ABM components *other than* missiles, launchers or radars (i.e., all exotics).

Sofaer presents no *direct* evidence that Karpov excluded exotics from coverage under Article V(1). He points to no explicit statement in the negotiating record wherein Karpov or any other Soviet negotiator expressly declared that this provision did *not* apply to such systems. Instead, Sofaer's case is basically deductive and inferential.

(1) Sofaer contends that the parties used the word "devices" when referring to exotics and the word "components" when referring to then-current ABMs.

The central premise of Sofaer's argument is that the wording of the Karpov-Graybeal agreement consisted of narrow "words of art" which effectively excluded mobile/space-launched ABMs using exotics.[61] Sofaer contends that the semantic distinction between 'devices' and 'systems and components' was an important one, recognized as such by the negotiators. In the specific case of the September 15 exchange, he argues: "when the Soviets used 'systems and components' in the context of Article V(1), they understood those words to exclude 'other devices' as used in the U.S. working papers on Article 6(2)."[62]

The essence of Sofaer's argument is that both the U.S. and the Soviet delegations equated ABM missiles, launchers and radars with the word "components" but when they wanted to refer to lasers or other exotics, they used other words. In the case of the U.S. it was the phrase "other devices." Sofaer contends that the Soviets refused to accept the phrase "other devices" and instead used such phrases as "undefined ideas" or "conjectural systems" to describe exotics.

Proceeding from these assumptions, Sofaer asserts that when Karpov agreed that Article V(1) applied to "any type of present or future components" of mobile/space-based systems, he "agreed to regulate only future 'systems' and 'components,' as he said, and not devices other than those systems and components, words he refused to accept."[63]

(2) Sofaer's suggestion that the parties used the terms "devices" and "components" as specialized terms of art is inconsistent with his analysis of Agreed Statement D.

This hypothesis is inconsistent with Sofaer's own analysis of Agreed Statement D. The core of Sofaer's case for the Reinterpretation is the argument that Agreed Statement D, and Agreed Statement D alone, represents the parties' agreement on the question of what limits should apply to exotics. He reads Agreed Statement D to bar their deployment, but not testing and development. The word "devices," however, which Sofaer equates with exotics, appears nowhere in Agreed Statement D. Instead, Agreed Statement D, which expressly addresses exotics ("ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars") and which is cited by Sofaer as the basis for prohibiting their deployment, refers directly to the "obligation not to deploy ABM systems and their components." Sofaer fails to explain how Agreed Statement D, which uses the word "components," can be read to ban deployment of exotics, while the September 15 Graybeal-Karpov exchange -- which used the word "components," -- cannot be read to apply to exotics because it did not expressly use the word "devices."

(3) The negotiating documents repeatedly refute Sofaer's contention that the parties used the terms "devices" and "components" as specialized terms of art.

An even more substantial problem for Sofaer's suggestion that "components" and "devices" were narrow terms of art is that it is directly contradicted throughout the negotiating documents. Although the original texts of the formal U.S. proposals for what became Article V(1) and Agreed Statement "D" used the words "other devices" in referring to futuristic systems, the negotiating documents are replete with examples in which Soviet and American negotiators routinely referred to "future systems" or "future components" when they were talking about lasers and other exotics.

The untenable nature of Sofaer's discussion of the word "components" is illustrated by the instructions to the negotiators in National Security Decision Memorandum 127. In each of the three key paragraphs of this crucial document, the U.S. Government used the word "components" as applicable to exotics. In Paragraph 3, NSDM 127 directed the Delegation to protect the right to develop and test fixed, land-based exotics, describing them as "future ABM components." (Emphasis added). In Paragraph 4, the directive instructed the Delegation to achieve a ban on the development, testing, and deployment of mobile/space-based exotics, referring to them as "ABM components other than ABM interceptor missiles, ABM launchers, or ABM radars to perform the functions of these components." (Emphasis added). And in Paragraph 5, NSDM 127 cautioned that Article V should not be interpreted in a way that would allow the Soviets to circumvent its restrictions "through future ABM systems and components." (emphasis added)

If Sofaer's analysis were correct, each of these provisions would have referred to "devices" rather than "components." Instead of providing a basis for Sofaer's reinterpretation, the consistency between the instructions and the September 15 Graybeal-Karpov exchange reinforces the validity of the Traditional Interpretation presented to and accepted by the Senate in 1972.

The following selections from the negotiating record (underlining not in original memcons) further illustrate the extent to which U.S. and Soviet negotiators used the words "components" or "system" in a broader sense than merely missiles, launchers and radars, or used words different than "other devices" to describe exotics. Rather than revealing a scrupulous observance of a narrow definition of the words "systems" and "components" -- as Sofaer claims -- the record indicates an extraordinary degree of interchangeability of such phrases as "future systems", "future components," "future devices," "future means," "future types," and "future kinds."

> August 17, 1971. Ambassador Smith: "the Agreement should apply to all types of ABM systems, including possible future types of ABM systems, and not only to ABM systems employing ABM interceptor missiles, ABM launchers, and ABM radars.[64]
>
> August 17, 1971. Harold Brown: "... future kinds of systems, not using the usual components...[65]
>
> August 27, 1971. Harold Brown: "Surely we would not want an agreement which would permit either side to deploy an ABM system both thick and nationwide simply

because the system did not use interceptors, launchers, or radars. Paragraph 1 of Article 6 is an undertaking not to do so, thus preventing systems or components using such new concepts from being used to circumvent the ABM Treaty.[66]

August 27, 1971. Ambassador Smith: "If such future systems were not covered, uncertainties would increase and the result would be an arms race in other ABM systems with the opposite result from that which we sought in an arms control agreement[67]

August 31, 1971. General Trusov: "...development, testing and deployment of such future systems would be observed by our national means of verification...:[68]

September 2, 1971. Victor Karpov: "...a system, whatever it might be, if it is tested in an ABM mode it is an ABM system.[69]

September 3, 1971. General Trusov: "The U.S. side's objective in including a paragraph in Article 6 to provide obligations not to deploy ABM systems, including future systems which use components other than ABM launchers, interceptors and radars is not clear...what is, in fact, involved is conjectural systems, i.e. some possible future systems not now known to anybody.[70]

September 6, 1971. Victor Karpov: "...any system tested in an ABM mode would be an ABM system..."[71]

September 8, 1971. Sidney Graybeal: (the August 17 U.S. proposal on exotics) "is intended to address future ABM systems that would utilize components or devices other than launchers, missiles, or radars."[72]

September 8, 1971. Colonel Fedenko: "The same situation would prevail in the future as regards other means that might be used for ABM systems."[73]

September 8, 1971. Sidney Graybeal: "(Article V(1)) is intended to address future ABM systems that would utilize components or devices other than launchers, interceptor missiles or radars."[74]

September 8, 1971. Victor Karpov: "The (SCC) would make it possible to handle such questions of future systems.[75]

September 8, 1971. Sidney Graybeal: "An operative article, indicating clearly the obligations with regard to improvement of existing ABM systems and with regard to future systems would be far more useful than merely

> referring these questions to the Standing Commission."[78]

These statements by U.S. and Soviet negotiators, which preceded the decisive September 15 Graybeal-Karpov exchange, confirm that both sides routinely referred to future ABM "systems" and "components" when they were discussing exotics. There is simply no basis for Sofaer's claim that there was an inviolable rule by which all references to future ABM "systems" and "components" excluded exotics and referred only to ABM missiles, launchers, and radars. From the point of view of both semantics and common usage of these words by the negotiators themselves, there is no reason to believe that when Karpov agreed with Graybeal's interpretation that Article V (1) applied to "any type of present or future components" of ABM systems, the two men were under any misconception as to exactly what they were discussing.

This conclusion is underscored by the fact that when the U.S. Delegation reported this agreement to Washington on September 24, it did not use the words "other devices." Instead, as previously mentioned, it reported that the agreement on mobile/space-based ABMs included "components for future ABM systems which are not fixed and land-based." (emphasis added) Yet, the Delegation did not inform Washington that this reflected a fundamental failure to carry out its instructions, as communicated six weeks earlier in NSDM 127. To the contrary, the intent of the cable was to inform Washington that an important part of the U.S. Delegation's instructions had been successfully achieved.

The conclusion that "future components" and "other devices" were seen by both sides as essentially interchangeable is further substantiated by a subsequent important statement by General Allison on February 1, 1972. In the course of a discussion with General Trusov about the use of the words, "systems," "components," and "devices," Allison observed that:[77]

> Both sides have a clear understanding for some time that within the context of our negotiations when we speak of an ABM system we are referring to a system made up of three components -- ABM launchers, ABM interceptor missiles, and ABM radars. We also appear to agree that substituting a different component for one of these three in the future would result in what we refer to as a "future" or "other" ABM system. (emphasis added)

In his memcon, Allison notes: "General Trusov agreed with my observation." Thus, both generals agreed that when the two sides referred to "future ABM systems," they were talking about a system involving the substitution of a "different component" for the then-current missile, launcher, and radar components.

b. Reliability of the accounts of the meeting

Perhaps recognizing the difficulty raised for the Reinterpretation by the September 15 exchange, Sofaer's opinion attempts to use rhetorical devices to downplay its significance or question the accuracy of the U.S. report of this meeting. For example, the opinion gratuitously implies that the U.S. record of what was transpired at the meeting is suspect because it is attended on the U.S. side "only" by Graybeal and FitzGerald.[78] This ignores the fact that limiting the number of participants is a standard diplomatic procedure when negotiations are deemed to have reached a penultimate stage. Sofaer also states that the record of this meeting is "sparse and ambiguous."[79] This comment might fairly be applied to many other memcons, including those which Sofaer believes support his case. Finally, Sofaer appears to attempt to cast doubt on the veracity of Graybeal and FitzGerald's memcon of this meeting by stating that Karpov "reportedly" agreed to the prohibition on future components at the September 15 exchange."[80] Given the September 24 report by the Delegation and the absence of any indication in the negotiating record that any member of the delegation had a contrary view, there is no basis for the suggestion of unreliability contained in Sofaer's portrayal of these events.

c. Harold Brown's views

Sofaer's next line of attack is based upon a statement on December 10, 1971 in which Harold Brown cited the Outer Space and Seabed treaties as precedents for including a ban on future systems in the provision that became Agreed Statement D. Sofaer maintains that Brown logically would have cited the September 15 Karpov-Graybeal agreement on banning mobile/space-based exotics had there been such an agreement, and implies that the omission of that citation casts doubt as to whether Brown believed such an agreement had been reached.[81]

This argument completely overlooks reasonable explanations for Brown's remarks -- that he cited treaties then in force as the most persuasive support for his point and did not want to risk reopening a tentative agreement which had only been reached *ad referendum*. It should be noted that final (and formal) agreement by the full delegations to the text of Article V(1) did not occur until May 1972.

Moreover, Sofaer's memo reflects no effort to determine the views of Harold Brown on this very point. In an interview with my staff, Dr. Brown stated that he had no doubt in December 1971 that Graybeal and FitzGerald had achieved what they said they achieved with regard to mobile/space-based exotics, and he recalled no dissension within the U.S. Delegation as to the outcome of the September 15 meeting.[82]

d. Ambassador Nitze's views

In making the case for the reinterpretation, Sofaer did not interview any of the principal negotiators except for Ambassador Nitze, who is a member of the current Administration. All of the principal negotiators except for Nitze, have stated that they viewed the September Graybeal-Karpov exchange as supportive of the Traditional Interpretation.

Ambassador Nitze has recently stated that he believes the September 15 Graybeal-Karpov understanding was viewed by the Soviet side to cover only future development of any type of the three then-current components for ABMs .[83] On March 19, 1987, Ambassador Nitze submitted to the Senate a seven-page classified memo (maintained in Room S-407) in which he summarizes his position on the negotiating record, including his belief that it provides "strong evidence that supports the so-called 'broad interpretation". It is noteworthy, though, that in a July 8, 1977 letter (mentioned in Part Two of this report), he expressed the view that the term "ABM systems and their components" includes future systems, a view which is fundamentally inconsistent with the reinterpretation.

e. The translators' memorandum

A related issue regarding the September 15 exchange involves a change in wording used by the Soviets to describe ABM components. In the prior Soviet texts, they had used the Russian work "sredstva" (which signifies "components" -- or, more literally, "means") in the description of ABM components. The text which Karpov tabled on September 8 -- which set the stage for the September 15 exchange -- used the Russian word "komponenty" (another word for "components") in place of "sredstva."

As described above, Karpov noted on September 15 that the Soviet proposal not only eliminated from the U.S. text the specific listing of ABM system components (launchers, interceptors, and radars) but also used the word "komponenty" instead of the word "sredstva." "Sredstva" had been used by the Soviets in Article II (the definitional article) when referring narrowly to launchers, interceptors, or radars. The emphasis Karpov placed on this word change was consistent with his previously noted statement (on September 2) that Article V entailed "other obligations" broader than those applied narrowly to the three then-current components listed in Article II and helped established the basis for the exchange in which Graybeal and Karpov agreed that the text meant "any type of present or future components."

Sofaer attempts to reject the relevance to "exotics" of the Graybeal-Karpov exchange by citing a subsequent discussion by the

U.S. and Soviet translators. The gist of Sofaer's argument is that on September 17, two days after the Graybeal-Karpov exchange, U.S. and Soviet translators agreed that these two Russian words were for all intents and purposes interchangeable.[84]

Sofaer's analysis does not reflect the complete record on this issue. His opinion relies on a portion of the memcon of the September 17 meeting which states that the translators agreed that the word "components" as it appeared in the phrase "systems and their components" could be translated as either "sredstva" or "komponenty" by the Soviets "as they wished."[85] Having highlighted this part of the memcon, Sofaer fails to assess a crucial qualifying phrase -- that either word could be used "so long as there is no substantive problem involved." There was, however, a reason for the change in wording. Karpov deliberately chose to use a different word ("komponenty") as a means of underscoring the difference between Article V (which Karpov confirmed included "other obligations") and Article II, (which, at the time, specifically referenced ABM launchers, interceptors, and radars.)

This differentiation was further underscored by the Soviet decision in mid-December to change "sredstva" in their draft of Article II to "komponenty." Sofaer contends that this change offers further indication of the insignificance of this word choice issue. What Sofaer overlooks, though is that this change occurred at precisely the same time that the Soviets were, in the course of extended discussions with U.S. negotiator Raymond Garthoff, grudgingly moving toward final acceptance of the formulation for Article II, broadening its scope to include future ABM components different from the three then-current components.

As Sofaer himself notes (though he never connects it with his discussion of the"sredstva/komponenty" issue), the Soviets on December 10 began to "waiver" on the U.S. insistence that the deployment of future "exotics" of a fixed, land-based mode had to be banned.[86] Three days later, Soviet negotiator Grinevskiy tabled a new Soviet text for Article II, which used the word "komponenty" for the first time. The text read as follows:[87]

> An ABM system is a system specially constructed and deployed to counter strategic ballistic missiles or their elements in flight trajectory and including the following components...

In sum, there is nothing in the translators' memorandum or in Sofaer's analysis of it that shows either inconsistency with the Traditional Interpretation or that expressly supports the proposition that the parties agreed to permit testing and development of mobile/space-based ABMs using exotics.

f. The effect of reaching a compromise

Sofaer also refers to the memcon of a September 20 meeting of the SWG in which Garthoff mentions "the compromise proposal" of September 15. According to Sofaer: "Had the Soviets agreed that 'components of ABM systems' included other devices to substitute for missiles, launchers and radars, this draft would have been a U.S. victory, not a compromise."[88]

As previously noted, Sofaer's memo fails to note or take account of Paragraph 5 of the U.S. Delegation's original instructions and the effect of that provision in establishing a predisposition for compromise. This may explain why Sofaer's analysis ignores the nature of the disagreement between the U.S. and Soviet delegations prior to the September 15 meeting as to the wording that should be used to address future systems. The Soviet Union wanted to ensure that any explicit reference in the treaty to "devices" (the term used in the U.S. proposal) could not be used to restrict the development of their non-ABM defense systems. The U.S. was concerned that the Soviet proposal (which referred only to missiles, launchers, and radars) could be easily circumvented through exotic systems.

The compromise language also reflected the tension between the U.S. proposal to ban "devices" and the Soviets interest in having the U.S. divulge the details of its research by providing them with a detailed list of such devices. The result of the September 15 Graybeal-Karpov meeting (i.e., a prohibition on development or deployment of mobile/space-based ABM systems "or any components therefor") was -- as Garthoff recognized -- a compromise, not on the principle which underlay the U.S. proposal (future systems must be included) but rather in the choice of words that satisfied the primary interests of both parties.

Sofaer has correctly noted that the United States agreed to drop the explicit reference to "other devices." Nonetheless, the fact that the United States elected to accept a "compromise" does not support Sofaer's conclusion that the Soviets refused to prohibit the development and testing of mobile/space-based ABM components using exotics. Rather, it underscores the fact that in negotiations one rarely has its original proposals accepted verbatim. In most diplomatic dealings, it is often necessary to find an acceptable middle ground that satisfies the basic objectives of both parties. In the case of the ABM negotiations, the essence of the compromise was an agreement that in exchange for dropping the word "devices," the U.S. Delegation secured a Soviet pledge that the word "components" would apply to all future "components" -- including future components other than missiles, launchers, and radars.

II. Soviet statements regarding exotics during November and December, 1971

A. Sofaer finds that Soviet conduct in the November-December timeframe confirms that they had not agreed to ban the development, testing, or deployment of mobile/space-based exotics

Sofaer's basic premise is that "Had the Soviets agreed to prohibit development, testing, and deployment of all future, unknown mobile 'devices' that could replace known systems or components, they should have been far more accommodating in accepting Article 6(1)."[89] Rather than being more receptive to limits on fixed, land-based exotics, however, Sofaer concludes that "the record demonstrates that the Soviet position against attempting to regulate future, unknown substitute devices was profound, and continued unabated after September 15."[90]

B. The negotiating record demonstrates that Soviet statements subsequent to the September 15 agreement are consistent with the prohibition on testing and development of mobile/space-based exotics. There were no subsequent statements that expressly exempted mobile/space-based exotics from Article V.

(1) General discussion concerning exotics

As noted, Sofaer contends that however one views the September 15 understanding, Soviet conduct in the November-December timeframe suggests that they had not agreed to ban the development, testing, or deployment of mobile/space-based exotics. This view reflects evidence in the negotiating record that the parties continued to discuss exotics, without expressly distinguishing between fixed, land-based systems and mobile/space-based systems.

However, there is not a single instance in the negotiating record in which a Soviet delegate denies that the September 15 agreement on Article V(1) applied to mobile/space-based "exotics." There is no statement in the post-September timeframe in which a Soviet negotiator says that Karpov had intended that the only "future ABM components" covered by this provision were future versions of the three then-current ABM components. Nor is there any indication in the documents submitted to the Senate in 1986 that the Soviets ever informed the U.S. Delegation that it had decided to reverse its position on these questions, that it had been overruled by Moscow, or that Karpov had erred.

Moreover, Sofaer's hypothesis discounts the fact that as a result of the key September 15 discussion, the two sides agreed to remove the brackets from Article V(1) (thereby signifying agreement on that portion of the Treaty dealing with _mobile/space-based_ exotics) while agreeing to leave the brackets around the provision dealing with _fixed, land-based_ exotics (thereby signifying continued disagreement). In short, in the context of the key September 15 breakthrough, it would have been abundantly clear to both parties that the discussions on future systems in November and December were focused on a provision in the Joint Draft Text that remained bracketed -- that is, the provision proposed by the United States for limiting _fixed, land-based_ exotics.

2. Soviet statements recognizing the Article V(1) limitations on exotics

Contrary to Sofaer's contention that the Soviet statements reflect a lack of agreement on limiting exotics, various statements by Soviet negotiators in the post-September period discuss the September 15 agreement in a manner consistent with the traditional interpretation. For example, on November 30, 1971, Academician Shchukin described the September agreement on Article V(1) as "of fundamental importance" and revealed that it had been "confirmed in Moscow" during the recess in the negotiations. [91] Elaborating he said: "This provision in particular confirmed the importance both sides attached to preparing a draft which excluded the possibility of the deployment of ABM defenses of the territory of a country." (emphasis added) Shchukin would hardly have said Article V(1) "excluded the possibility" of such a defense if the September 15 agreement had left totally unconstrained the development, testing, and deployment of all mobile/space-based exotics -- in short, if at that stage there had been no limitations whatsoever on all future systems. In this regard, it is important to note that when Shchukin made this statement, the parties had not adopted Agreed Statement D, which Sofaer cites as the basis for the ban on deployment of exotics.

Sofaer notes this statement by Shchukin, but he claims that Shchukin was "unwilling despite this overall objective, to accept an obligation against deploying substitute devices."[92] Sofaer then quotes a lengthy statement by Shchukin which begins as follows:[93]

[November 30 Statement By Shchukin]

> The Soviet side cannot recognize as well-founded _the proposal_ of the U.S. involving an obligation not to _deploy_ ABM systems using devices other than ABM interceptor missiles, ABM launchers, or ABM radars to perform the functions of these components (emphasis added)

In Sofaer's view, this statement provides strong evidence that the Soviet Union was not only still opposed to including limitations on fixed, land-based exotics, but also that it had not agreed to any limitations on mobile/space-based exotics. A close examination of Shchukin's statement, though, indicates that Sofaer's representation of it is flawed. First, it should be remembered that in August the United States made _two separate_ proposals on exotics - one dealing with mobile/space-based devices or components, the other dealing with fixed, land-based devices or components. However, in his November 30 statement, Shchukin objects only to "_the_ proposal" of the U.S. side. "_The_ proposal" which Shchukin then goes on to describe (in Shchukin's words, the proposal "involving an obligation not to _deploy_ ABM systems using devices other than ABM interceptor missiles, ABM launchers, or ABM radars") is obviously a restatement of the still bracketed (i.e., unresolved) U.S. proposal to ban the _deployment_ of fixed land-based exotics. Recalling that the two sides had ended the previous round by agreeing that U.S. Article 6(1) would have to remain bracketed, it is not unusual that Shchukin would choose to reiterate Soviet objections to this U.S. proposal during a plenary meeting soon after the reconvening of the talks.

Sofaer's characterization of Soviet statements in this time frame is also contradicted by a December 4, 1971 statement by Soviet negotiator Chulitsky: [94]

> The prohibition on air-based, space-based, land-based, etc., ABM systems is adequate to cover the problem of future systems.

Sofaer contends that Chulitsky was only referring to future mobile versions of then-current ABM missiles, launchers, and radars. [95] This is not accurate. Chulitsky made his statement in the course of a discussion with U.S. delegate David Aaron that focused on what Chulitsky termed "unknown" systems and included Chulitsky's explicit statement that "no one knew what future systems might be."[96] Chulitsky's comments clearly referred to exotic ABMs, and not, as Sofaer claims, to future versions of then-current ABM missiles, launchers, and radars.

III. Analysis by the U.S. Delegation of the Treaty's impact on mobile/space-based exotics in January-May 1972.

A. Sofaer finds that the analysis of the Treaty prepared by the U.S. Delegation reflects the lack of agreement with the Soviets in Article V(1) on the issue of exotics

The Delegation's Legal Advisor, John Rhinelander, prepared a series of memoranda during the January-May time period in 1972 containing article-by-article descriptions of the treaty. Sofaer notes various points in which Rhinelander placed language dealing with exotics in brackets or used qualifying language, thereby suggesting uncertainty as to whether an agreement had been reached on Article V(1) during the fall of 1971 limiting mobile/space-based exotics.

For example, Sofaer cites a footnote in Rhinelander's treatment of Article V(1) in his February 16, 1972 "Article-by-Article Analysis" that read as follows: "U.S. has not made its position clear to Soviet, and Soviet position not clear." Sofaer then states:[97]

> consistent with this conclusion, Rhinelander made no claim in February 1972 that Article II extended beyond "current components". Instead, he wrote: "An ABM system is described in paragraph 1 of Article II in terms of 'current' ABM components."

B. Sofaer's position is directly refuted by the negotiating record. The analyses of the negotiations prepared by the U.S. Delegation reflect the parties' agreement that Article V(1) contained a comprehensive prohibition against development, testing, and deployment of mobile/space-based ABMs, including those using exotics.

As noted, the negotiating record includes a series of memos prepared during the last five months of the negotiation by the legal adviser to the Delegation, John Rhinelander. Each memo, entitled "Article-by-Article Analysis of ABM Treaty," consisted of two parts. The first part of the memorandum set forth the text of each provision. Where disagreement remained between the U.S. and the Soviets, the language was bracketed. The second part of the memo set forth comments, with brackets indicating definitions, descriptions, or interpretations which were not yet agreed upon within the U.S. Delegation. The brackets would not be removed until the Delegation collectively agreed on the meaning as set forth in the accompanying commentary.

1. The discussion of mobile/space-based exotics in Rhinelander's January 24, 1972 Article-by-Article Analysis.

In the first Rhinelander Article-by-Article Analysis, dated January 24, 1972, the text of Article V(1) appears as follows:[98]

> Each Party undertakes not to develop, test, or deploy [ABM systems or their components that are] sea-based, air-based, space-based, or mobile land-based [ABM systems or their components.].

Rhinelander's memo provides no explanation for the brackets. However, as highlighted in later memos, it appears that there was concern about proper placement in this sentence of the words "ABM systems or their components". If the words appeared at the end of the sentence (as was then the case in the U.S./Soviet Joint Draft Text), there was the potential for misreading it as only banning ABM systems all or most of whose components were mobile, but not prohibiting an ABM system in which only one of the components was mobile. As the brackets imply, this problem could be corrected by moving the words "ABM systems or their components" forward in the sentence. The following comments in Rhinelander's January 24 memo make it clear that Article V(1) was intended to serve as a comprehensive ban on the development, testing, and deployment of mobile/space-based ABMs, including exotics:[99]

[Excerpt from Rhinelander's January 24 memo]

> Paragraph 1 of Article V prohibits the development, testing or deployment of:
>
> - an ABM system that is sea-based, air-based, space-based, or mobile land-based.
> - an ABM interceptor missile, ABM launcher, or ABM radar that is sea-based, or mobile land-based.
> - a device, which would replace an ABM interceptor missile, ABM launcher or ABM radar in an ABM system, that is sea-based, air-based, space-based, or mobile land-based.

The absence of brackets in this notation in Rhinelander's memo means that the U.S. Delegation collectively agreed that Article V(1) covered exotics. The comprehensive nature of the coverage under Article V(1) is further illustrated by the following comment that appears elsewhere in Rhinelander's January 24 memo:[100]

[Excerpt From Rhinelander's January 24 memo]

> Nothing in the Treaty prohibits testing and development of ABM systems based on future technology other than paragraph 1 of Article V, which prohibits the development, testing or deployment of any ABM system, or any ABM component, which is sea-based, air-based, space-based or mobile land-based. (emphasis added)

Sofaer's opinion completely omits Rhinelander's January 24 Article-by-Article Analysis. This is an inexplicable omission in light of the clear support it provides for the comprehensive nature of the prohibition against testing and development of any space-based systems.

2. The discussion of mobile/space-based exotics in Rhinelander's February 16, 1972 Article-by-Article Analysis

The next Article-by-Article Analysis, dated February 16, also contains the relevant material on the interpretation of Article V(1). In the following excerpt from Rhinelander's February 24 memo, the Treaty text is underlined. The narrative below the underlined text describes the U.S. Delegation's views on the meaning of the text. The narrative also contains two footnotes designated by asterisks -- the second of which is crucial to Sofaer's analysis of the negotiating record.[101]

[Excerpt from Rhinelander's February 16 memo]

> Each Party undertakes not to develop, test, or deploy sea-based, air-based, space-based, or mobile land-based ABM systems or their components.*
>
> Paragraph 1 of Article V prohibits the development, testing or deployment of:
>
> -- an ABM system that is sea-based, air-based space-based, or mobile land-based.
>
> -- [an ABM interceptor missile, ABM launcher, or ABM radar that is sea-based, air-based, space-based, mobile land-based.]**
>
> -- [a device (which would perform the functions an ABM interceptor missile, ABM launcher or ABM radar in an ABM system) that is sea-based, air-based, space-based, or mobile land-based.]**
>
> * ACDA proposes this paragraph be revised as follows:
>
> 1. Each Party undertakes not to develop, test or deploy ABM systems or their components that are sea-based, air-based, space-based, or mobile land-based.
>
> ** U.S. has not made its position clear to Soviets, and Soviet position is not clear.

As previously noted, Sofaer suggests that the second footnote (designated by a double asterisk) indicates that the parties were not in agreement as to the application of Article V(1) to exotics. He apparently reaches this conclusion on the assumption that this footnote applies exclusively to the sub-paragraph in the narrative dealing with devices that would perform the functions of then-current ABM components.

Sofaer's theory is undermined, however, by his failure to recognize that the footnote designated by a double asterisk applies to two sub-paragraphs in the narrative, and only the second sub-paragraph relates to future devices. The first time the double asterisk appears is in reference to mobile ABMs using then-current components. For Sofaer's view of the footnote to be correct, one would have to conclude that the U.S. Delegation also was uncertain as to whether the parties had agreed that Article V(1) prohibited development, testing, and deployment of mobile systems using then-current ABM components. Such a reading would be contrary to the express words of Article V(1), rendering it meaningless.

There is a much more reasonable explanation for the second footnote in this excerpt from Rhinelander's February 16 memorandum. As discussed above, Rhinelander's January 24 memo had noted a drafting problem in the text that left open the possibility that the text could be read in a manner that would exempt both then-current components and "exotic" components from the prohibition on testing and development if they were mobile but part of larger fixed system. The "fix" proposed by ACDA, as noted in Rhinelander's February 16 memo, was intended to rectify this problem, both with respect to then-current and future components.

The reference in the footnote ("U.S. has not made its position clear to the Soviets and Soviet position is not clear") is consistent with the fact that the U.S. Delegation had not yet offered any clarifying language and it did not know how the Soviets would respond.

A separate comment in the Rhinelander February 16 Analysis -- which is not cited by Sofaer in his discussion of the double asterisk footnote -- confirms the prohibition on testing and development of mobile systems based on future technology:[102]

[Excerpt from Rhinelander's February 16 memo]

> Nothing in the Treaty prohibits testing or development (as distinguished from deployment) of ABM systems or ABM components based on future technology other than paragraph 1 of Article V, which prohibits the development, testing, or deployment of any ABM system, or any ABM component, which is sea-based, air-based, space-based or mobile land-based. (emphasis added)

The foregoing excerpt from Rhinelander's February 16 memo underscores two points: First, Article V(1) covered mobile/space-based exotics by banning their development, testing, and deployment. Second, the Treaty distinguished between development and testing, on the one hand, and deployment, on the other, as it applied , in Rhinelander's words, to "ABM systems or ABM components based on future technology." This is consistent with both the formal instructions to the negotiators and the original meaning of the Treaty presented to the Senate.

3. The discussion of mobile/space-based exotics in Rhinelander's April 20, 1972 Article-by-Article Analysis

Before considering Rhinelander's next Article-by-Article Analysis, dated April 20, 1972, it is necessary to consider the events that transpired in late March and early April.

a. Events preceding April 20, 1972

(1) Mobile components in fixed, land-based systems

On March 23, 1972, National Security Decision Memorandum 158 directed the Delegation to seek modification of Article V(1) to address the word order problem noted by ACDA:[103]

[Excerpt from NSDM 158]

> ABM Treaty, Article V(1) (Mobile ABM Components). The Delegation should make it clear to the Soviets that this provision applies to all ABM components (viz., launchers, interceptors, radars, and other devices capable of substituting for them) which are not fixed, land-based. The Delegation should seek to revise Article V(1) along the following lines: "Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based." If the Soviets raise the issue, the Delegation should state that the revised provision does not apply to such devices as satellites providing early warning by detection of missile launch.

Sofaer contends that the instruction "apparently reflects concern that 'other devices' might not be covered" under Article V(1).[104] This is an inaccurate reading of the instruction because, as previously noted, the concern was over closing a loophole which might have allowed the Soviets to deploy a mobile ABM component (whether then-current or "exotic") if such a mobile component was part of a larger fixed, land-based ABM system, and not whether Article V(1) failed to extend to exotics.

(2) The distinction between "adjuncts" and "components"

The last sentence of NSDM 158 reflected the U.S. concern over the issue of "adjuncts." An adjunct was considered to be a device that (1) was part of an overall ABM system; (2) involved technologies other than missiles, launchers, or radars; and (3) could not, standing alone, substitute or perform the functioins of an ABM missile, launchers, or radar. The U.S. considered the distinction between "components" and "adjuncts" to be crucial. Although the U.S. wanted to prohibit testing and development of mobile/space-based ABMs that used either present and future technology, the U.S. did not want the Treaty to be interpreted in a manner that would ban the testing, development, or deployment of "adjuncts" essential to early warning systems.

(3) The Soviet accept the U.S. clarification

On April 6, U.S. Ambassador Graham Parson executed the instructions contained in NSDM 158 at a meeting of the Special Working Group. Parsons proposed changing the word order of Article V(1) as directed by the NSDM. His prepared talking points for that meeting stated: "For the sake of greater clarity, we suggest that this paragraph be slight reworded..." His paper also noted: "This revision makes clear that the paragraph applies to all ABM components and not just to overall ABM systems."[105] Parsons' remarks underscore the fact that the change in wording was a minor drafting change, and rebut Sofaer's theory that NSDM 158 embodied a new proposal on mobile "exotics."

In attempting to deal with Parsons' remarks, Sofaer asserts that Parsons "did not attempt to accomplish the task of making sure that the Soviets understood 'components' to include substitute 'devices' other than missiles, launchers, or radars."[106] This is an irrelevant observation because there was not a requirement for Parsons to do so. Having created a task for Parsons out of whole cloth (a requirement to obtain a new agreement on future devices), Sofaer is unable to explain why Parsons failed to pursue the matter with the Soviets. The simple answer is that neither the text of the instructions nor the context of the negotiations required Parsons to obtain a new agreement; rather, he was only required to ensure that the technical change in words ensured that neither side could deploy a mobile ABM component (whether then-current or "exotic") in the guise of it being part of an overall system that was fixed, land-based.

On April 10, Soviet negotiator Grinevsky informed Parsons that he was "pleased to report that the Soviet side agreed to amend paragraph of Article V of the Treaty Joint Draft Test (JDT) in accordance with the April 6 proposal of the U.S. side."[107] The routine and business-like manner in which the Soviets responded to this proposal provides further evidence that both sides regarded this matter as a technical drafting problem, and not a fundamental policy issue on whose outcome rested the handling of mobile exotics under the Treaty.

b. The clarificaton is noted in Rhinelander's April 20, 1972 Analysis

The successful agreement on the technical change in wording was noted in Rhinelander's next Article-by-Article Analysis which quotes and describes Article V(1) as follows:[108]

[Excerpt from Rhinelander's April 20 memo]

> Each Party undertakes not to develop, test or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based."
>
> Paragraph 1 of Article V prohibits the development, testing or deployment of:
>
> -- an ABM system that is sea-based, air-based space-based, or mobile land-based.
>
> -- an ABM interceptor missile, ABM launcher, or ABM radar that is sea-based, air-based, space-based, mobile land-based.
>
> -- [a device (which would perform the functions an ABM interceptor missile, ABM launcher or ABM radar in an ABM system) that is sea-based, air-based, space-based, or mobile land-based.]*
>
> * U.S. has not emphasized position in text, which is based on guidance, and the Soviet position may not be clear.
> ISSUE: Whether U.S. should make U.S. position in "Four Points" on future systems; see page 13, footnote 1.

As reflected above, the Rhinelander commentary on this provision lists the same three "bullets" as the February 16 draft, but drops the brackets around bullet two (concerning ABM missiles, launchers, and radars) while keeping brackets around bullet three -- which dealt with exotics. As will be explained, the concern indicated by the retention of the brackets around this sub-paragraph most likely related to the "adjuncts" issue.

c. Inconsistencies and omissions in Sofaer's interpretation of Rhinelander's memos

As previously noted, Sofaer contends that the use of brackets around the bullet dealing with exotics reflected uncertainty within the U.S. Delegation as to whether Article V(1) covered exotics. This line of analysis, however, ultimately is fatal to Sofaer's case for the Reinterpretation, because Rhinelander's final Article-by-Article Analysis, dated May 24, 1972, deleted the brackets around the bullet addressing exotics.[109] In so doing, using the logic of Sofaer's explanation of the April 20 draft, the May 24 analysis removed any implication of uncertainty within the U.S. Delegation as to the agreement on exotics. A consistent rule should be applied: if Rhinelander is to be believed when he documents doubts within the delegation (as denoted by his use of brackets), he should also be believed when he documents a collective agreement by the delegation (as denoted by the removal of the brackets).

A further flaw in Sofaer's approach is the failure to adequately address the footnote in Rhinelander's April 20 memo, which refers to the "Four Points" presented by Garthoff on January 31, 1972, in the course of negotiations over what became Agreed Statement "D". The "Four Points" reflected specific points or understandings on which Garthoff believed the two sides agreed.[110] During the discussions at the January 31 meeting, Garthoff had addressed the problem of "adjuncts" in the following terms:[111]

[January 31 statement by Garthoff on "adjuncts" issue]

> Devices other than ABM interceptor missiles, launchers or radars could be used as adjuncts to an ABM system provided that the devices could not perform the functions of an substitute for ABM interceptor missiles, ABM launchers, or ABM radars. For example, a telescope could be deployed as an adjunct to an ABM system whereas a laser for performing the function of an interceptor missile by rendering ineffective a strategic ballistic missile in flight trajectory could not be deployed

Page 13 of Rhinelander's April 20 memo, which makes reference to the Garthoff statement quoted above, indicated that although the Delegation had raised the "Four Points" with the Soviets, "We have yet to learn Soviet reaction." This explains the brackets around bullet three in Rhinelander's April 20 description of Article V(1)'s applicability to future systems: it was still not clear at that point whether the U.S. position on the definition of "adjuncts" had been accepted by the Soviet side. The uncertainty was not as to the general agreement on prohibiting testing and development of exotic components; rather there was uncertainty as to how the Soviet's would react to the U.S. position that the prohibition should not apply to adjuncts.

This reading of the footnote is reinforced by another footnote in Rhinelander's April 20 memo, which notes that Article V(1) does not prohibit mobile early warning systems, but warns that there is a question as to whether a "satellite using long-wave infrared technology that could observe the boost phase of ICBM trajectories and alert that an attack was underway" would be exempt. Rhinelander then noted that "Guidance indicates U.S. should not raise this issue. Soviets apparently agree in principle."[112] (emphasis added) In light of this notation, it is clear that when Rhinelander noted in the earlier footnote (that is, the footnote to the bracketed sub-paragraph commenting on the meaning of Article V(l) as it applies to "devices") that: "U.S. has not emphasized position in text, which is based on guidance," the "guidance" he was referring to was guidance to the delegation from Washington on how to handle the adjuncts issue -- and not guidance, as Sofaer implies, to revisit the fundamental question of whether the Soviet side had agreed that Article V(l) applied to future components capable of performing the function of existing ABM missiles, launchers or radars.

Although, as noted, Rhinelander acknowledged that the delegation's guidance was not to raise the adjuncts issue (since, in his words, the Soviets "apparently agree in principle"), he nevertheless recommended that "An agreed interpretation or U.S. statement differentiating 'permitted' non-ABM systems from 'prohibited' space- or air-based ABM components, using either current or 'future' technology, might be useful."[113] (emphasis added) This recommendation was rejected. However, it further illustrates the fact that Rhinelander's principal concern in these footnotes was the important question of whether the U.S. side had adequately protected its interest in keeping ABM adjuncts out of the Treaty -- and not whether it had failed to get exotic ABM components in.

4. The discussion of mobile/space based exotics in Rhinelander's May 24, 1972 Article-by-Article Analysis

a. The distinction between adjuncts and components

Further confirmation of the U.S. Delegation's concern about carefully distinguishing between permissible ABM adjuncts and prohibited ABM exotics is provided by the final Rhinelander Article-by-Article Analysis, dated May 24, 1972 -- just two days prior to the signing of the Treaty in Moscow. This memo provides the following illustration in the course of noting that Agreed Statement "D" is based on the "Four Points":[114]

[Excerpt from Rhinelander's May 24 memo]

> For example, a "killer" laser system or particle accelerator which substituted for one or more ABM components would be prohibited. In addition, a satellite sensor, using advanced technology such that it could observe the boost phase of ICBM trajectories and obtain sufficiently accurate data that would permit launching an ABM interceptor without relying on other ABM tracking sensors, would be considered a prohibited, future system based on devices which substituted for current ABM components.

This explanation reflects an agreement on a rule of thumb concerning the distinction between adjuncts and components: If the "device" could, standing alone, substitute for one of the three then-current ABM components, then it was a component. If the "device," standing alone, could not so substitute, then it was an adjunct.

b. Further refutation of Sofaer's reinterpretation

The distinction between adjuncts and components is also reflected in the commentary in Rhinelnader's May 24 memo on

Article V(1), which deletes the brackets around bullet three (reflecting agreement on the prohibition against development, testing and deployment of mobile/space-based exotics) and expressly cites as an example of an exotic ABM component "an air-based 'killer' laser." The description of Article V(1) in the final Rhinelander Analysis, in which all brackets were absent, read as follows:[115]

[Excerpt from Rhinelander's May 24 memo]

> Paragraph 1 of Article V prohibits the development, testing, or deployment of:
>
> -- an ABM system that is sea-based, air-based space-based, or mobile land-based.
>
> -- an ABM interceptor missile, ABM launcher, or ABM radar that is sea-based, air-based, space-based, or mobile land-based.
>
> -- a device capable of substituting for an ABM interceptor missile, ABM launcher or ABM radar that is sea-based, air-based, space-based, or mobile land-based (such as an air-based "killer" laser).

In this form, the memorandum fully confirms the Traditional Interpretation of the Treaty as presented to the Senate and directly refutes Sofaer's reinterpretation.

IV. The negotiations concerning the definition of ABM systems and components in Article II.

A. Sofaer finds that the definition of ABM systems and components in Article II, which refers to ABM interceptor missiles, ABM launchers, and ABM radars, limits the restrictions in the Treaty to those three then-current components

The traditional view of the negotiations over Article II of the Treaty holds that the U.S. Delegation, in discussions led by Raymond Garthoff, was able on December 20-21, 1971 to obtain Soviet consent to change the text of this provision to incorporate the connective phrase "currently consisting of" and that this change thereby had the effect of extending the definition of "ABM systems" to include all future ABM components, including exotics. This version of events is strongly endorsed in the 1985 FitzGerald Report.

In his analysis, Sofaer disputes this account:[116]

[Excerpt from Sofaer analysis]

> The developments of December 20-21 are described in the FitzGerald study as an "impasse" that "was suddenly broken..." One might infer from this that the Soviets had changed their minds and agreed to the U.S. view that "ABM system" should be defined potentially to extend to all substitute devices. In fact, however, the Soviets agreed to the change in Article II, only after Garthoff assured them "that the question of constraints on future systems would be settled elsewhere than in Article II"... and after Garthoff and the U.S. Delegation had made this assurance tangibly credible by agreeing to drop Article V(3) of the U.S. draft and to seek instead a separate, agreed minute to the Treaty on the subject of future devices.

Article II(1) of the treaty states: "For the purposes of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of: [ABM interceptor missiles, ABM launchers, and ABM radars]." Sofaer contends that "the definition in Article II(1) was not merely illustrative, but was intended to describe the actual components covered by the Treaty."[117] Consistent with this view, he also maintains that:[118]

> The premise that Article II(1) defines "ABM system" in a functional manner, meant to include all future systems and components, is difficult to sustain. The provision can more reasonably be read to mean that the systems contemplated by the Treaty are those that serve the functions described and that currently consist of the listed components. (emphasis added)

B. The negotiations concerning the definition of an ABM system in Article II contradict Sofaer's analysis and underscore the parties' intent that the definition would cover exotics

The following review of the negotiating record demonstrates that the "currently consisting of" language was adopted with express recognition that Article II would thereby apply to future systems.

1. The December 1971 agreement to cover exotics

a. Insertion of the phrase "currently consisting of" to modify the listing of then-current ABM components

On December 9, 1971, the Soviets informed the U.S. Delegation that their "difficulties" with the definition of ABM systems in Article II were related to the differences of the parties over a separate U.S. proposal for a ban on the deployment (but not development and testing) of fixed, land-based exotics, then identified by mutual consent as Article V(3).[119] Grinevsky suggested a trade-off: the Soviets would agree to a functional definition in Article II (as proposed by the U.S. side) if the U.S. side would agree to drop Article V(3). Interestingly, though, he candidly informed his American counterparts that:[120]

> it would be necessary for his Delegation to go through the ritual of trying to get concessions from our [i.e., the U.S.] side on Article V before he could be authorized to reach an agreement accepting the basic U.S. position on Article II.

This very revealing comment by the senior Soviet delegate tasked with resolving the disagreement over Article II is not cited by Sofaer.

On December 20, Garthoff gave the Soviets a new U.S. draft for Article II that maintained a functional definition of "ABM system" -- that is, defining an ABM systems as "a system to counter strategic ballistic missiles or their elements in flight trajectory" -- but which also retained separate definitions for ABM missiles, ABM launchers, and ABM radars without any connective between the definition for "system" and the definitions for the three different system components.[121]

At a meeting later that day, Garthoff and Grinevsky engaged in a give-and-take discussion of this draft which resulted in a change, inserting the connective wording "currently consisting of" between the definition provided in the text for "ABM system" and the definitions provided for the three system components.

b. Direct recognition of the possibility of future systems

The document concerning this decisive meeting reflects the following discussion:[122]

> **[Memcon of December 20 exchange on Article II]**
>
> Grinevsky stated that the second problem [of three concerns he had about the new U.S. text] was the absence of a connective between the sub-paragraph defining ABM systems, and the three sub-paragraphs following which defined components. His Delegation strongly believed that there should be some connective such as "namely" or "consisting of." Garthoff stated that the American side did not consider that a connective of this kind was either necessary or desirable. If, however, there was to be one, it should be precise. Therefore, he suggested, we might consider use of the phrase "currently consisting of" as a connective. This was clearly a new thought to Grinevsky and Kishilov and they appeared uncertain of the reaction of their side. Garthoff noted that the Soviet side, as well as the American, recognized that there could be future systems, and while the question of constraints on future systems would be settled elsewhere than in Article II, the correct way of indicating a valid connection between components and systems would be to include the word "currently". Grinevsky agreed to take up this possibility with his Delegation. (emphasis added)

Garthoff's proposal, in short, was that the parties go ahead and agree then on a text for Article II that would define "ABM systems" to include future ABM systems while leaving it to other provisions of the Treaty to settle the question of what specific limitations would apply to such systems.

The next day, the Soviet side presented a new draft text that incorporated the connective "currently consisting of" -- thereby accepting Garthoff's proposal. The memcon of the December 21 meeting reveals that in accepting the U.S. proposal, Grinevsky and Kishilov emphasized "a very delicate situation within the Soviet Delegation" wherein "the expression 'currently consisting of' had been strongly objected to by some members of the Soviet delegation."[123] The members in question were presumably the Soviet military. In short, the two Soviet negotiators were revealing that it had taken a struggle to gain approval for Garthoff's proposal.

Sofaer does not explain why there would have been such a fight within the Soviet delegation if, as he believes, Garthoff's language did not have the effect of bringing future systems under the definition of "ABM system" in Article II. Indeed, Sofaer fails even to note that Grinevsky and Kishilov revealed this information.

c. Other deficiencies in Sofaer's analysis of the agreement on Article II

The Grinevsky-Garthoff exchange undermines Sofaer's textual analysis of Article II, in which he asserts that Article II applies only to the three then-current systems or future versions of those three systems. As previously noted, Sofaer claims that the Soviets accepted the phrase "currently consisting of" only after the U.S. side provided two assurances: first, "that the question of contraints on future systems would be settled elsewhere than in Article II," and second, "the U.S. Delegation made this assurance tangibly credible by agreeing to drop Article V(3) of the U.S. draft [banning deployment of fixed, land-based exotics] and to seek instead a separate, agreed minute to the Treaty on the subject of future devices."

Rather than supporting the Reinterpretation, this observation contradicts Sofaer's premise that Article II(1) applies only to the three then-current ABM components. It is an express acknowledgement by Sofaer that the parties intended to address future systems in the Treaty. Under those circumstances, it was natural that the definition be sufficiently flexible to cover both present and future systems. The fact that the parties had not yet agreed on the degree to which fixed, land-based exotics should be limited in the obligational provisions of the Treaty is irrelevant to the scope definition of ABM systems in Article II(1).

Aside from the fact that this episode does not support the Reinterpretation, it is also noteworthy that Sofaer does not accurately portray the actions of the U.S. Delegation in these exchanges. The U.S. did not take the position, as suggested by Sofaer, that it would "drop" Article V(3) and "seek instead" a separate Agreed Minute. On the contrary, the U.S. took the position that withdrawal of Article V(3) was contingent on "a clear agreed understanding" in the form of an Agreed Minute.[124] In other words, the U.S. did not retreat from the position which was then represented by the U.S. proposal denominated as Article V(3) (and which later became Agreed Statement D) that fixed, land-based ABMs using exotics should not be deployed. This is reinforced by the statement in the negotiating record that the option of an Agreed Minute was offered by the U.S. side "to contribute to negotiating progress, while maintaining our basic position in this matter."[125] (emphasis added)

2. Post-December statements concerning the definition of "ABM systems"

Sofaer points to three separate exchanges or comments by U.S. or Soviet negotiators subsequent to the December 21

Garthoff/Grinevsky understanding in support of his proposition that not only the Soviets, but also the U.S. side, did not believe Article II applied to future systems. The negotiating record reveals that none of the three statements substantiate his argument.

a. The January 26 Garthoff-Grinevsky discussion

(1) The U.S. concern about adjuncts

Sofaer cites a January 26, 1972 discussion between Garthoff and Grinevsky during which the U.S. Delegation proposed, and the Soviets rejected, the addition of a clarifying clause to Agreed Statement D dealing with adjuncts.[126] At that stage, the text of Agreed Statement D dealt with the possibility that ABM components "other than ABM interceptor missiles, ABM launchers or ABM radars" might be created. The U.S. Delegation wanted to add words making it clear that "components" limited by this provision were those capable of performing the functions of ABM missiles, launchers, or radars. The U.S. concern was that absent this qualification, the Soviets might call a sensor a "component" -- even though it could not substitute for one of the three then-current components.

(2) Sofaer's description of the discussion

Sofaer attempts to support the proposition that Article II applied only to the three then-current components by summarizing the discussion as follows:[127]

[Sofaer's characterization of the January 26 discussion]

> On January 26, both Parties stated that Article II applied to three then-current components of ABM systems, and that Agreed Statement D would apply to all future components that would take the place of interceptors, launchers, or radars.

(3) The negotiating record does not support Sofaer's description

Sofaer's account does not provide an accurate description of the negotiating document. The memcon of this discussion reads as follows:[128]

[Memcon of January 26 discussion]

> Garthoff explained that ... [the additional language] ... was intended to make more precise the intention of the sentence, which he believed both sides shared, that we were talking [in Agreed Statement D] about future system components which might take the place of ABM interceptor missiles, ABM launchers or ABM radars. He recalled Grinevsky's earlier reference to telescopes supplementing but not supplanting radars, and noted that we believed this additional language would help make clear that additional elements of such kinds were not the subject of the sentence."

The memcon adds that Grinevsky rejected Garthoff's proposal as unnecessary.[129]

> [Grinevsky] noted that the sentence already makes clear that reference is to future ABM system components other than the three indicated in the sentence and in Article II of the Treaty. Article II made clear that these are the three components currently comprising ABM systems, and the language under discussion makes clear that it was referring to precisely such system components other than the three current ones which were listed.

Contrary to Sofaer's suggestion, the discussions did not draw a distinction between Article II's supposed exclusive concern with then-current components and Agreed Statement D's supposed exclusive concern with exotics. Instead, the discussion involved a distinction, applicable both to Article II and Agreed Statement

D, between the treatment of "components" (which could perform the function of traditional ABM components) and "adjuncts" or "sub-components" (which could not substitute for a traditional component). Grinevsky was merely pointing out that the three then-current components were a baseline from which all future components were distinguished as "other" components. His statement was neutral on the question of whether such "other" components were or were not covered under Article II. He did not express the view, as Sofaer claims, that Article II "only" covered ABM missile, launchers, and radars.

b. The February 1 exchange between Allison and Trusov

Sofaer also cites the February 1, 1972 exchange between General Allison and General Trusov as "another exchange... suggesting that both Parties assumed that Article II did not bring within its definition future, substitute ABM systems or components."[130] Sofaer bases this assertion on the previously cited comment by General Allison that "both sides have had a clear understanding for some time that within the context of our negotiations when we speak of an ABM system we are referring to a system made up of three components -- ABM launchers, ABM interceptor missiles, and ABM radars."[131] He cites no supporting evidence for the suggestion that Allison was making a precise and delimiting comment on the scope of Article II. Moreover, the significance Sofaer attaches to this comments is dubious in light of what General Allison said next: "We also appear to agree that substituting a different component for one of these in the future would result in what we refer to as a 'future' or 'other' ABM system."[132] In short, the February 1 exchange between the two generals offers no support for Sofaer's claim that General Allison and General Trusov both doubted that Article II covered future systems.

c. Rhinelander's Article-by-Article Analysis

(1) Sofaer misrepresents Rhinelander's February 16, 1972 Analysis

As previously noted, Sofaer states that "Rhinelander made no claim in February, 1972 that Article II extended beyond 'current' components." Sofaer's comment misrepresents this particular memo by Rhinelander and omits a crucial sentence.

Rhinelander's February 16 Article-by-Article Analysis contained the following notation with regard to Article II:[133]

[Excerpt from Rhinelander's February 16 memo]

> An ABM system is described in paragraph 1 of Article II in terms of 'current ABM components.' See discussion of prohibition on deployment of future ABM systems under Article III. Examples of possible future ABM components are 'killer' lasers and particle accelerators.

While Rhinelander's memo stated that Article II is "described" in terms of then-current ABM components, it did not assert that Article II was limited to these three components. On the contrary, as is evident in the above excerpt, Rhinelander cites two possible types of future systems in the course of commenting on Article II.

(2) Rhinelander's April 20 and May 24 Analyses make it clear that the definition in Article II covers future systems

Whatever ambiguity may exist in the February 16 memo was removed in subsequent drafts of Rhinelander's Article-by-Article Analysis. In his April 20 analysis, Rhinelander wrote the following about Article II:[134]

[Excerpt from Rhinelander's April 20 memo]

> An ABM system is described in paragraph 1 of Article II in terms of "current" ABM components. This does not, however, limit the generality of the term ABM system as used in the Treaty to systems composed of "current" ABM components, but would also include "future systems" based on physical principles other than those used for "current" ABM components.

In his May 24 Analysis, the final version prior to signing of the Treaty, Rhinelander used much the same terminology to describe the scope of this provision:[135]

[Excerpt from Rhinelander's May 24 memo]

> An ABM system is described in paragraph 1 of Article II in terms of 'current' ABM components. This does not however, limit the generality of the term ABM system as used in the Treaty to systems composed of "current" ABM components, but would also include "future systems" based on physical principles other than those used for "current" ABM components and capable of substituting for a "current" ABM component.

Rhinelander's descriptions represented the formal collective position of the U.S. negotiating team. These memoranda directly refute the claim that the negotiating record supports the Reinterpretation.

V. The negotiations concerning restrictions on deployment under Article III of the Treaty

A. Sofaer finds that the negotiating record supports his theory that Agreed Statement D is the only provision of the Treaty covering exotics.

Article III of the Treaty bans the deployment of all ABM systems with the exception of two fixed, land-based systems using then-current components. Sofaer contends that Article III imposes no limitation on the deployment of exotics:[136]

[Excerpt from Sofaer's analysis]

> In the subsequent negotiations, a change was made in Article III that made clearer than in earlier drafts that only those systems and components specified in the Article could be deployed. The provision did not, however, expressly prohibit the deployment of substitutes for "systems" or "components".

B. Contrary to Sofaer's contention, the negotiating history of Article III, which governs deployment of ABM systems and components, demonstrates that Article III covers deployment of exotics.

Sofaer's position that Agreed Statement D is the only provision of the treaty covering exotics is contradicted by three separate parts of the negotiating record: (a) the discussion on January 31 of Garthoff's "Five Points," (b) the April 28 discussion when the Soviets first indicated they could accept the final U.S. proposal for Article III, and (c) Rhinelander's Article-by-Article Analysis. The following considers each of these portions of the negotiating record.

1. The January 31 point paper on future ABM systems.

As previously noted, on January 31, 1972, Garthoff handed his Soviet counterparts a point paper, entitled, "Statement on 'Future ABM Systems'".[137] The point paper was based on the proposition that there was agreement on five separate considerations establishing the mutually understood framework for final agreement on the text of Agreed Statement "D". Point Four of Garthoff's "Five Points" read as follows:[138]

> Article III should be drafted so as not to permit the deployment of devices other than ABM interceptor missiles, ABM launchers, or ABM radars to substitute for and perform their functions."

If as Sofaer maintains, the Soviet Union did not intend Article III to apply to "exotics," Point Four -- which applied to exotics -- certainly would have met with Soviet opposition. However, the memcon of this meeting states: "After reading the talking points, Grinevsky said that he believed they were in complete agreement."[139] (emphasis added)

Grinevsky was the official tasked by the Soviets with reaching an accord on this provision ad referendum to the full delegation. His favorable disposition toward this interpretation of Article III was confirmed on April 28, 1972, in response to an April 11 U.S. proposal for Article III that had the effect of incorporating Point Four of Garthoff's Five Points -- that is, it modified the lead-in clause to Article III in a manner which would ban the deployment of all ABM systems (including exotic ABM systems) while permitting an exception only for specified fixed-land based systems using then-current ABM components.[140]

2. The April 28 agreement on Article III

On April 28, Grinevsky informed the U.S. side that the Soviet side could agree to the new U.S. formulation. The text of Ambassador Parson's memcon of this discussion reads as follows:[141]

> **[Memcon of April 28 discussion on Article III]**
>
> I [Parsons] said that if I understood him correctly, he [Grinevsky] was saying that they could agree to a formulation undertaking not to deploy ABM systems or their components except as the Article would provide. Grinevsky said that they could, as this would ban "other systems". (emphasis added)

Sofaer initially concedes that Grinevsky's statement could be read as lending supporting to the "restrictive" interpretation, stating that "conceivably, Grinevsky meant systems based on other physical principles, and therefore indicated that the Soviets were finally willing to agree that Article III banned the deployment of such systems."[142] Sofaer then pronounces this reading "doubtful," contending that a "more likely explanation" is that Grinevsky's reference to "other systems," was intended to affirm that the U.S. formulation would prohibit deploying then-current ABM missiles, launchers, or radars at locations "other than" the two sites described in Article III. Sofaer insists that Grinevsky was not agreeing that the new U.S. text for Article III would ban deployments of "exotics," a function which Sofaer reserves for Agreed Statement "D".

There are four major problems with Sofaer's hypothesis. First, he points to nothing in the record of the April 28 discussions that affirmatively expresses the view that exotics are excluded. Second, as noted earlier, Grinevsky indicated "complete agreement" on January 31 that Article III _should_ prohibit "the deployment of devices _other than_ ABM interceptor missiles, ABM launchers, or ABM radars to substitute for and perform their functions."[143] Third, Sofaer provides no explanation, other than that a conclusory statement, as to why Grinevsky would have said that the provision banned "other systems" if he had meant to say that it only permitted deployments at the two specified locations. In short, had that been his intent, he more logically would have said explicitly that the new text for Article III banned "other _sites_" or "other _locations_" -- not "other systems."

This reading of Grinevsky's comment is reinforced by the memcon of the January 26 Garthoff-Grinevsky meeting, which notes the following under the heading of "Future ABM Systems":[144]

[Memcon of January 26 meeting]

Future ABM Systems

> Grinevsky then asked about the subject of "other" or future ABM systems.

What followed was an extended discussion on the exotic ABM systems covered in Agreed Statement D. In short, it is clear that Grinevsky equated "other systems" with exotics, and this was the focus of his crucial remark when Article III was signed on April 28. Sofaer points to no documents supporting adopting a view to the contrary.

Finally, it is worthwhile recalling General Allison's statement of February 1, 1972, in which he noted that both sides agreed that substituting a different component in the future for an ABM missile, launcher, or radar "would result in what we refer to as a 'future' or 'other' ABM system."[145] Allison noted that Trusov agreed with his observation. In this context, it is apparent that when Parsons and Grinevsky agreed that the final text for Article III would ban "other systems," the parties meant "other ABM systems" in the same sense as described by Allison and agreed to by Trusov -- i.e., future components capable of substituting for ABM launchers, missiles, or radars.

3. Rhinelander's Article-by-Article Analyses

The application of Article III to all future systems is also substantiated by the four successive versions of Rhinelander's Article-by-Article Analysis:

- Rhinelander's January 24 memo states that Article III, as intended by the U.S. Delegation, would permit deployments of ABM systems "consisting only of systems based on ABM interceptor missiles, ABM launchers and ABM radars, and not a system based on technology which substitutes for any one of these components..."[146]
- Rhinelander's February 16 memo states that Agreed Statement "D" (which, by then, had been agreed to by the two sides) was based, *inter alia*, on the following "consideration": "Article III, as drafted, does not permit the deployment of devices other than ABM interceptor missiles, ABM launchers, or ABM radars to substitute for and perform their functions."[147] The February 16 memo further notes that this understanding (Point Four of Garthoff's "Five Points" from January 31)

had been informally presented to the Soviets and "the Soviets have not agreed that further clarification is necessary."[148]

- This point is again reiterated in Rhinelander's April 20 draft, with a footnote indicating that the U.S. Delegation had decided to raise Garthoff's points with the Soviets again to ensure there was no misunderstanding.[149]
- Rhinelander's final Article-by-Article Analysis -- written ten days after the formal acceptance of the April 28 Parsons/Grinevsky agreement on Article III at the full delegation level (and just two days before the Treaty was signed) -- states that "Article III limits the deployment of ABM systems to those based on ABM interceptor missiles, ABM launchers and radars."[150]

Sofaer correctly notes that Rhinelander's final, May 24 memo declares that Article III bans the deployment of "substitute components." However, Sofaer asserts that this result is allegedly only achieved by Rhinelander "through the combination of that Article and Agreed Statement D."[151] Sofaer provides no substantiation for this allegation other than his general theory that it is only Agreed Statement D (and not Articles II and III) which effectively prohibits the deployment of exotics.

VI. The negotiations concerning testing and development under Article IV of the Treaty

A. Sofaer finds that Article IV only applies to then-current ABMs

Article IV states:

> The limitations provided for in Article III (governing fixed, land-based ABMs) shall not apply to ABM systems or their components used for development and testing and located within current or additionallly agreed test ranges. Each party may have no more than a total of fifteen ABM launchers at test ranges."

This provision reflected both sides' appreciation that the ABM deployment limitations in the Treaty would be rendered meaningless if either side could circumvent them through the guise of development of testing. The concern voiced repeatedly by both sides was that a party might "deploy" ABM systems and components on a widespread basis by claiming that the systems and components were not really "deployed," but were only development or test models."

The term ABM systems and components, which appears in Article IV, is defined in Article II. Sofaer insists that this term is limited to three components existing in 1972 (missiles, launchers, and radar) and does not include future technologies capable of substituting for those components. As noted above, his discussion of Article II is not supported by the negotiating record. The viability of the reinterpretation is further refuted by the inadequacy of its discussion of Article IV.

Sofaer's only reference to Article IV is the following:

> Article IV...limits to fifteen the number of "launchers" at those ranges, thereby suggesting that it is addressed only to current technology."[152]

B. Contrary to Sofaer's claim, the negotiating record demonstrates the parties' understanding that Article IV would apply to exotics

The question of the applicability of Article IV to exotics was addressed explicitly in the Rhinelander memos. Rhinelander's April 20 Article-by-Article Analysis sets forth the following description of Article IV:[153]

[Excerpt from Rhinelander's April 20 memo]

> [This Article would permit development and testing only at current or additionally agreed test ranges of fixed, land-based devices capable of substituting for fixed, land-based ABM interceptor missiles, ABM launchers, or ABM radars, the deployment of which is prohibited by Article III.]

The brackets around this statement indicated that as of April 20, the U.S. Delegation was not in agreement that this understanding had been achieved with the Soviets. In a footnote to the statement, Rhinelander explained: "This issue has not been raised with Soviets." However, in his May 24 memo, Rhinelander removed the brackets and deleted the footnote, thus reflecting the U.S. Delegation's final judgement that this understanding had indeed been reached with the Soviet side.[154]

This conclusion by the delegation directly undercuts Sofaer's reinterpretation. Because the reference to ABM systems or components in Article IV applies to exotics, it is reasonable to conclude that the same term in Article V (which prohibits development, testing, and deployment of mobile/space-based ABMs) also applies to exotics. Moreover, Sofaer's failure to address or note the discussion of Article IV's applicability to exotics in Rhinelander's April 20 or May 24 memos is damaging to the credibility of his analysis.

VII. Negotiating documents concerning the relationship between Agreed Statement D and the limitations on testing, development, and deployment in the main body of the Treaty

A. Sofaer finds that in order to avoid redundancy with other parts of the Treaty, Agreed Statement D must be read as the only portion of the Treaty addressing deployment of exotics

Agreed Statement D, as contained in the final version of the Treaty, reads as follows:

> In order to ensure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty.

Under the Traditional Interpretation, Agreed Statement D complements Article III (which bans deployment of all ABM systems, including exotics, except for fixed, land-based systems expressly permitted at the two specified deployment sites) and Article IV (which permits testing and development of fixed, land-based exotics at agreed test ranges). Agreed Statement D, under the Traditional Interpretation, provides that if such testing and development leads either side to propose deployment of such exotics, the parties should negotiate the limitations which would govern such deployments. If, however, there is no agreement on appropriate amendment to the Treaty, the deployment of exotics remains prohibited.

Sofaer, in his Reinterpretation, takes a different view. He contends that the Traditional Interpretation results in a reading of this provision that duplicates other parts of the Treaty (i.e., the ban on deployment of exotics in Article III and the procedure for discussing and agreeing upon amendments in Articles XIII and XIV). To address this ambiguity and give independent meaning to this provision, he argues it should be interpreted in light of the fact that it is the only part of the treaty that expressly mentions exotics. Therefore, Agreed Statement D should be read as banning deployment of all exotics (including fixed, land-based and mobile/space-based) unless the parties agree to amendments permitting such deployment. Moreover, because it only addresses deployment, it should be read as permitting testing and development of all exotics, including mobile/space-based as well as fixed, land-based.

B. The negotiating record refutes Sofaer's description of the relationship between Agreed Statement D and the main body of the Treaty

Sofaer's redundancy argument contains a major flaw in that it fails to consider adequately the relationship between Agreed Statement D and Articles III and V(1) in the negotiating record.

1. The chronology refutes Sofaer's redundancy argument

By the end of 1970, the parties had agreed on the basic principle of a total ban on testing and deployment of mobile ABMs.[155] As noted above, the parties confirmed in September 1971 that this principle would be applied to "exotic" as well as then-current ABM systems and components, and broadened the prohibition to include development as well. During the same period of time, the parties had not yet reached agreement on fixed, land-based systems -- using _either_ then-current _or_ "exotic" technologies. Although there was a general understanding that Article III would severely restrict the deployment of fixed, land-based systems, there was no agreement on the scope of deployment or on this provision's applicability to "exotic" technologies. Thus, the negotiations over Agreed Statement D took place in the winter of 1971-72 in the context of an agreed prohibition on testing, development, and deployment of all mobile systems, but in the absence of any agreement on the details concerning fixed, land-based systems, including exotics.

Even if one were to assume, for purposes of argument, that the text of Agreed Statement D is redundant in light of the Article III ban on deployment of all ABM systems and components not specifically authorized, it was not redundant _at the time_ the parties concurred on the text of Agreed Statement D, because the lead-in clause to Article III was not in its final form and there was no formal agreement that the final version of this article would be drafted to cover exotics.

The negotiations over the number of ABM interceptors and the number of deployment sites permitted under Article III proved to be the most difficult aspect of the negotiations. Thus, the question of whether Article III would also have the effect of banning deployment of all fixed, land-based "exotics" was held hostage to this dispute. The text of Article III was not agreed to by the parties until May 12, 1972 -- less than two weeks before

President Nixon and General Secretary Brezhnev were scheduled to meet to sign the treaty.

In light of this chronology, the issue raised by the final agreement on Article III was not whether Agreed Statement D should be *added* to the Treaty, but whether this extremely complicated issue should be reopened by proposing to *delete* the agreed statement. Given the affirmative purposes served by Agreed Statement D under the Treaty as adopted, as will be discussed in Appendix A, it is not particularly remarkable that there was no move to delete Agreed Statement D.

2. References to Article V

Sofaer fails to adequately deal with this chronology. He cites various statements in the negotiating record in which Agreed Statement D is referred to in the context of Article V as lending support for his view that the exotics covered under the agreed statement were not limited to fixed, land-based devices.[156] These references to Article V are not very significant, however, in light of the fact that Agreed Statement D was once denominated as Article V(3). None of the references in the negotiating record to Article V expressly tie Agreed Statement D to any of the substantive provisions of Article V that remained after Article V(3) was transformed into Agreed Statement D. Indeed, Sofaer concedes that the reference to Article V might simply have been a careless notation in light of its evolution during the negotiations.[157]

3. Relationship between Agreed Statement D and the limitations on deployment of fixed, land-based systems under Article III

A further problem is that Sofaer overlooks specific statements in the negotiating record expressly relating Agreed Statement D to the limitations on deployment of fixed, land-based ABMs under Article III. For example, on December 7, 1971, Kishilov "urged that some way be found to express the difference over this point (i.e., limits on fixed, land-based 'exotics') in Article III rather than in Article V."[158] On December 14, Shchukin, in a meeting with Harold Brown, further associated the U.S. proposal on fixed, land-based exotics with Article III:[159]

> **[December 14 statement by Shchukin]**
>
> [I]t should be possible to provide that if components based on new technologies were developed which could substitute for the components limited under Article III ... the matter should be referred to the (SCC) and agreements thereon reached by Governments so there would be no circumvention of the limitations on Article III."

Further indication that the Soviet side understood Agreed Statement D as applying exclusively to fixed, land-based exotics is provided by a candid comment by Grinevsky at a meeting with Garthoff on January 26. At this meeting, the two sides finally reached agreement in principle on the basic thrust of Agreed Statement D, though some haggling over final word choices persisted for another week. Recognizing that the two sides had effectively closed this issue (save for final drafting), Grinevsky informed Garthoff that the Soviet Union "had accepted the American position on the subject entirely, save only that it would be a jointly agreed interpretation rather than a paragraph in the Treaty."[160] (emphasis added)

This important statement is not cited by Sofaer in his analysis. Given that "the American position" was to differentiate between types of exotics -- with a ban on development, testing and deployment applied to those that were mobile/space-based and a ban only on deployment for those that were fixed, land-based -- Grinevsky's confirmation that the Soviet side recognized that it had "accepted the American position on the subject entirely" offers strong support for the Traditional Interpretation of the Treaty.

In addition, Rhinelander, in each of his Article-by-Article Analyses, placed Agreed Statement D under Article III and described it as an authoritative interpretation of this article. These aspects of the record undercut Sofaer's assertion that Agreed Statement D modifies or supercedes the ban on testing and development of mobile exotics in Article V.

4. Sofaer's inconsistency in assessing the difference between fixed and mobile exotics

Sofaer also suggests that Agreed Statement D should not be viewed as differentiating between fixed and mobile exotics because it would have been "a scientific and practical incongruity" to have established one set of restrictions on mobile exotics (banning testing, development and deployment in Article V) and another set of restrictions on fixed, land-based exotics (addressing only deployment) in Article III.[161] This proposition is refuted directly by the negotiating record. The

U.S. Delegation was instructed to achieve just such an agreement -- precluding testing and development of mobile exotics while permitting such testing and development in a fixed, land-based mode -- in explicit instructions signed by President Nixon on August 9, 1971.[162]

Sofaer's failure to reconcile these instructions with his claim concerning "a scientific and practical incongruity" is another example of the serious deficiencies within his analysis. When discussing the negotiating instructions -- which distinguish between fixed, land-based and mobile/space-based exotics -- Sofaer takes the view that the negotiators failed to achieve an agreement that embodied such a distinction. When discussing the relationship between Agreed Statement D and Articles III and V -- which embodies the distinction between fixed, land-based exotics and mobile/space-based exotics -- the opinion takes a wholly contradictory approach, stating that it would have been a scientific and practical incongruity to achieve such an agreement -- the very agreement that the Delegation was instructed by President Nixon to secure.

5. Summary

In summary, Agreed Statement D was adopted at a time when there was no other agreed provision banning the deployment of fixed, land-based exotics. By the time Article III had been modified to achieve this same result and had been agreed by the two sides, the negotiators were under enormous pressure to finalize the Treaty prior to a meeting of the heads of state in less than two weeks. Because Agreed Statement D was not inconsistent with any part of the Treaty -- and provided useful guidance in terms of handling the adjuncts issue -- there was no reason to delete it. In the absence of any significant evidence refuting this explanation for the retention of Agreed Statement D, Sofaer's "redundancy" argument does not provide an adequate basis for rejecting the Traditional Interpretation.

VIII. Conclusion

In the final analysis, Judge Sofaer's case for the Reinterpretation rests on his contention that Agreed Statement D is the only provision in the Treaty in which the Soviet Union consented to limit exotic ABM systems or components. Consistent with this position, Sofaer claims that:

a. Article III, which restricts ABM deployments to two specified sites, did not establish a ban on the deployment of exotics;

b. Article II, which defines the terms used throughout the Treaty, did not cover exotics;

c. Article IV, which deals with permissible development and testing, did not limit the development and testing of exotics to agreed test ranges; and

d. Article V, which limits mobile/space-based ABM systems and components, did not apply to exotics.

For the Reinterpretation to be valid, Judge Sofaer cannot simply be right on one of these four points; nor can he afford to be right on only two or three of these points. Rather, to substantiate his Reinterpretation, Judge Sofaer must be right on four out of four of these points.

A careful review of the negotiating documents provided to the Senate reveals that Judge Sofaer is not right on four out of four of these points. He is not right on three of them; nor is he right on two of them. Indeed, Judge Sofaer is wrong on all four points:

a. With respect to Article III, the negotiating record establishes that on April 28, 1972, the senior Soviet negotiator tasked with reaching agreement on this provision accepted the final U.S. proposal for the article after he specifically acknowledged that it would have the effect of banning the deployment of what he called "other systems" -- that is, by his own usage of those words, exotics.

b. With respect to Article II, the negotiating record reveals that on December 20, 1971, the U.S. side proposed a word change (adding the connective phrase "currently consisting of") after noting explicitly that both sides recognized that there were going to be "future systems" (i.e., exotics) and therefore the connective phrase used in the article had to take account of this fact. Moreover, the negotiating record reveals that when the senior Soviet negotiator tasked with reaching agreement on this provision accepted the U.S. proposal the next day, he confided in his American counterparts that the U.S. proposal had been accepted by the Soviet side over the strong opposition of some members within his delegation (i.e., the Soviet military).

c. With respect to Article IV, the internal working documents of the U.S. Delegation reveal that prior to the signing of the Treaty on May 26, 1972, the delegation formally and collectively agreed that the Soviet negotiators had agreed that this provision restricted the development and testing of fixed, land-based exotics to agreed test ranges.

d. With respect to Article V, the negotiating record reveals that on September 15, 1971, the U.S. Delegation obtained a binding commitment from the senior Soviet negotiator tasked with reaching agreement on the article that the Soviet Union would interpret the words "ABM components" as they appeared in this provision as applying to "any type of present or future components" of ABM systems. Furthermore, the negotiating record establishes that in the view of both delegations, "future components" included exotics.

On close analysis, Sofaer's reconstruction of each of these four episodes proves deficient. In addition, the credibility of Sofaer's analysis is undermined by a number of serious omissions. These include:

- His failure to note or take into account a key paragraph in President Nixon's original instructions to the U.S. negotiators directing them to avoid a detailed discussion of such systems;

- His failure to note or take into account the tactics of the initial Soviet response to the U.S. proposal on exotics, including their efforts to probe for U.S. secrets, protect their air defenses and stall for time pending receipt of instructions from Moscow.

- His failure to note or take into account numerous statements by Soviet negotiators indicating possible flexibility on the U.S. proposals on exotics.

- His failure to note or take into account numerous statements by Soviet negotiators which contradict his hypothesis that the Soviets did not associate the word "components" with exotics.

- His failure to note or take into account the fact that both sides agreed that Article II, standing alone, established no obligations.

- His failure to note or take into account the split within the Soviet delegation over its acceptance of the U.S. proposal for Article II.

- His failure to adequately present the role played in the negotiating record by the U.S. interest in protecting the right to deploy ABM "adjuncts".

- His failure to note numerous comments in the analyses of the Treaty text prepared by the U.S. Delegation's legal adviser that substantiate the Traditional Interpretation.

- His failure to note or take into account the overriding importance both sides attached to preventing any circumvention of the Treaty's limits on deployment through clandestine deployments disguised as permitted deployment and testing activities -- i.e., the central role of Article IV in maintaining the integrity of the agreement.

- His failure to consult with or interview all but one of the former U.S. ABM negotiators, even though he speculates on the intent which underlay the statements and actions of these U.S. officials at various points in the negotiations.

Based on my review, I have concluded that the preponderance of evidence in the negotiating record supports the understanding which the Senate held at the time it gave its advice and consent to the ratification of the Treaty -- that is, the Traditional Interpretation. In a situation where the United States Senate, the former U.S. ABM negotiators, and four successive administrations (including, prior to 1985, the Reagan Administration) have upheld the Traditional Interpretation, the burden of proof is on those who would claim that this has all been an extraordinary mistake. In light of the basic flaws and repeated omissions in Judge Sofaer's analysis of the negotiating record, I do not believe that the case presented to date by the Administration meets this test.

IX. Footnotes for Part Four

1. 133 Cong. Rec. S-2967 (daily ed. March 11, 1987).

2. Office of the Legal Advisor, Department of State, "The ABM Treaty, Part II: Ratification Process," May 11, 1987.

3. Senate Consideration of the ABM Treaty in 1972 andd Constitutional Implications: Hearings before the Senate Foreign Relations and Judiciary Committees, March 26, 1987, prepared statement of Abraham D. Sofaer, at 31.

4. 133 Cong. Rec. S-3090 (daily ed. March 12, 1987).

5. "Document on Subsequent Practice: ABM Treaty", May 13, 1987, with transmittal letter, dated May 14, 1987, from the Acting Secretary of State Michael H. Armacost to Senators Pell and Helms, the Chairman and Ranking Member, respectively, of the Senate Foreign Relations Committee

6. 133 Cong. Rec. S-3171 (daily ed., March 13, 1987).

7. Office of the Legal Adviser, Department of State, "The ABM Treaty, Part I: Treaty Language and Negotiating History," May 11, 1987. .

8. "Application of the ABM Treaty to Systems and Components Based on Other Physical Principles," August 6, 1986, Memorandum prepared by Abraham D. Sofaer, [hereinafter cited as Sofaer.] The Sofaer memorandum, the FitzGerald Study, infra note 12, and all other negotiating documents referred to herein are located in the United States Senate, Room S-407.

9. 133 Cong. Rec. S-3171 (daily ed., March 13, 1987).

10. "SALT I Negotiating History Related to Limitations on Future ABM Systems and Components Based on 'Other Physical Principles.'" March, 1985, prepared by Charles L. FitzGerald, System Planning Corporation, Contract DNA 001-84-C-0309, [hereinafter cited as FitzGerald].

11. NSDM 117, quoted in FitzGerald, supra, at 17.

12. NSDM 127, quoted in FitzGerald, supra, at 18.

13. Sofaer, supra note 8, at 12.

14. Sofaer, supra note 8 at 12-13.

15. A-408, Annex 1, p. 9 (August 17, 1971).

16. Id.

17. A-398, at 12 (August 17, 1971)

18. A-438, at 9 (August 27, 1971).

19. *Id.*, Annex 1.

20. A-458, at 6-7 (September 3, 1971).

21. A-540, Ad Hoc Committee Meeting No. 4, p. 1 (September 8, 1971).

22. *Id.*, at 5.

23. Sofaer, *supra* note 8, at 14.

24. A-408, at 1 (August 17, 1971).

25. A-398, at 2 (August 17, 1971).

26. *Id.*

27. A-424, at 6 (August 24, 1971).

28. A-442, at 2 (August 31, 1971).

29. *Id.*

30. A-458, at 5 (September 3, 1971).

31. A-540, Ad Hoc Committee Meeting No. 4, at 5 (September 8, 1971).

32. A-481, at 2 (September 8, 1971).

33. *Id.*

34. A-498, at 2 (September 13, 1971)

35. *Quoted* in FitzGerald, *supra* note 10, at 19.

36. Interview with Graybeal, February 4, 1987.

37. For example, when Ambassador Semenov submitted the first Soviet draft for "Basic Provisions for an Agreement on Limiting the Deployment of ABM Systems" on December 4, 1970, he said that the obligations in the accord should apply "precisely to radars, missiles, and launchers and that it would be superfluous to establish limitations of any kind on any type of antiaircraft SAM systems, and also on missile attack warning radars, space monitoring radars and antiaircraft radars."

38. A-647, at 2.

39. Interview with Graybeal, February 4, 1987.

40. Sofaer, _supra_ note 8, at 18.

41. Sofaer, _supra_ note 8 at 19.

42. A-540, Ad Hoc Committee Meeting No. 1, at 4 (August 31, 1971).

43. A-540, Ad Hoc Committee Meeting No. 2, at 2 (September 2, 1971).

44. A-540, Ad Hoc Committee Meeting No. 3, at 2 (September 6, 1971).

45. _Id_., at 3.

46. A-540, Ad Hoc Committee Meeting No. 2, at 2 (September 2, 1971).

47. Sofaer, _supra_ note 8, at 29.

48. Sofaer, _supra_ at 23-24.

49. A-540, Ad Hoc Committee Meeting No. 4, at 6 (September 8, 1971).

50. A-540, Ad Hoc Committee Meeting No. 5, at 1 (September 13, 1971).

51. _Id_. (attachment)

52. _Id_., at 4.

53. A-503, at 1 (September 15, 1971).

54. _Id_., at 5.

55. _Id_., at 6.

56. Interview with Graybeal, February 7, 1987.

57. FitzGerald, _supra_ note 10, at 28.

58. _Id_.

59. SALT #1056.

60. Interview with Smith, February 5, 1987.

61. Sofaer, _supra_ note 8, at 24.

62. _Id_. at 24.

63. _Id_.

64. A-408, Annex 1 (August 17, 1971).

65. A-398, at 1-2 (August 17, 1971).

66. A-438, Annex 1 (August 27, 1971).

67. _Id_. at 9.

68. A-442, at 2 (August 31, 1971).

69. A-540, Ad Hoc Committee Meeting No. 2, at 3 (September 2, 1971).

70. A-458, at 5 (September 3, 1971).

71. A-540, Ad Hoc Committee Meeting No. 3 (September 6, 1971).

72. A-540, Ad Hoc Committee Meeting No. 3 (September 8, 1971).

73. A-481 (September 8, 1971).

74. A-540 Ad Hoc Committee Meeting No. 4 (September 8, 1971)

75. _Id_.

76. _Id_.

77. A-766, at 2 (February 1, 1972).

78. Sofaer, _supra_ note 8, at 20.

79. _Id_.

80. _Id_. at 24.

81. Id., at 37.

82. Interview with Brown, January 16, 1987.

83. Interview with Nitze, February 5, 1987.

84. A-511 (September 17, 1971).

85. Sofaer, _supra_ note 8, at 22-23.

86. _Id_. at 26. On this date, Academician Shchukin repeated the oft-stated Soviet preference for deferring this issue to the SCC. However, when pressed by Nitze whether the Soviets were likely to agree to such a limitation in the SCC, Shchukin stated that "if it were necessary, they (i.e., the Soviets) could agree to that." (A-639).

87. A-644 (December 13, 1971).

88. Sofaer, *supra*note 8, at 27.

89. *Id*. at 25.

90. *Id*.

91. A-59~~2~~3 (November 30, 1971).

92. Sofaer, *supra* note 8 at 36.

93. A-59~~2~~3 (November 30, 1971).

94. A-613 (December 4, 1971).

95. Sofaer, *supra* note 8 at, 36.

96. A-613 (December 4, 1971).

97. Sofaer, *supra* note 8, at 48.

98. "Article-by-Article Analysis of ABM Treaty," January 24, 1972 (Analysis of Article III-VI), John B. Rhinelander. [hereinafter cited as Rhinelander No.1].

99. *Id*.

100. *Id*.

101. "Third Draft of Article-by-Article Analysis of ABM Treaty," February 16, 1971, John B. Rhinelander [hereinafter cited as Rhinelander No. 2].

102. *Id*.

103. *Quoted* in FitzGerald, *supra* note 10, at 30.

104. Sofaer, *supra* note 8, at 28.

105. A-81~~9~~3 (April 6, 1972).

106. Sofaer, *supra* note 8, at 28.

107. A-840 (April 10, 1972).

108. "Article-by-Article Analysis of Treaty", April 20, 1972, John B. Rhinelander, [hereinafter cited as Rhinelander No. 3].

109. "Article-by-Article Analysis of ABM Treaty," May 24, 1972, John B. Rhinelander [hereinafter cited as Rhinelander No. 4].

110. A-763 (January 13, 1972).

111. _Id_.

112. Rhinelander No. 3, _supra_ note 108.

113. _Id_.

114. Rhinelander No. 4, _supra_ note 109.

115. _Id_.

116. Sofaer, _supra_ note 8, at 37.

117. _Strategic Defense Initiative, Hearings before the Subcommittee on Strategic and Theater Nuclear Forces of the SenateCommittee on Armed Services_, 99th Cong., 1st Sess. 143 (1985) (statement of Abraham D. Sofaer).

118. _Id_.

119. A-633 (December 9, 1971).

120. _Id_.

121. A-677 (December 20, 1971).

122. _Id_.

123. A-678 (December 21, 1971).

124. _Id_.

125. _Id_.

126. A-743 (January 26, 1972).

127. Sofaer, _supra_ note 8, at 34.

128. A-743 (January 26, 1972).

129. _Id_.

130. Sofaer, _supra_ note 8, at 35.

131. A-766 (February 1, 1972).

132. _Id_.

133. Rhinelander No. 2, _supra_ note 101.

134. Rhinelander No. 3, _supra_ note 108.

135. Rhinelander No. 4, _supra_ note 109.

136. Sofaer, _supra_ note 8, at 44.

137. A-763 (January 31, 1972).

138. _Id_.

139. _Id_.

140. FitzGerald, _supra_ note 10, 54.

141. A-863 (April 28, 1972).

142. Sofaer, _supra_ note 8, at 46.

143. A-763 (January 31, 1972)

144. A-743 (January 26, 1972).

145. A-766 (February 1, 1972).

146. Rhinelander No. 1, _supra_ note 98.

147. Rhinelander No. 2, _supra_ note 101.

148. _Id_.

149. Rhinelander No. 3, _supra_ note 108.

150. Rhinelander No. 4 _supra_ note 109.

151. Sofaer, _supra_ note 8, at 48.

152. Sofaer, _supra_ note 8 at 6.

153. Rhinelander No. 3, _supra_ note 108.

154. Rhinelander No. 4, _supra_ note 109.

155. FitzGerald, _supra_ note 10, at 15.

156. Sofaer, _supra_ note 8, at 44.

~~157.~~ _Id_.

158. A-619 (December 7, 1971).

159. A-647 (December 14, 1971).

160. A-743 (January 26, 1972).

161. Sofaer, _supra_ note 8, at 8.

162. NSDM 127, _supra_, note 12.

X. Appendix A

THE TREATY TEXT REVISITED

This appendix revisits the pertinent provisions of the text of Treaty, as well as the meaning ascribed to these provisions under both the Traditional Interpretation and Judge Sofaer's Reinterpretation, in light of the negotiating record and the explanations of the meaning of the Treaty presented to the Senate in testimony by the Nixon Administration in 1972.

I. The Traditional Interpretation

A. Article V(1)

Article V(1) explicitly bans the development, testing, and deployment of mobile/space-based ABMs. This provision provided the express basis for the Senate's consideration of the Treaty's impact on testing and development of exotics, particularly the July 19 exchange between Senator Jackson and the Administration's witnesses. There is nothing in the express language of this provision which indicates that some types of ABM systems or components (i.e., those which are "exotic" in design) are exempted. The negotiating record contains substantial and credible evidence that the parties intended this provision to extend to exotics.

B. Article II

Article II defines the terms used in the Treaty, including the terms used in Article V's ban on deployment of mobile systems. This provision defines an ABM as a "system to counter strategic ballistic missiles or their elements in flight trajectory," and illustrates the definition by describing ABMs as "currently consisting of" launchers, missiles, and radar. The negotiating record indicates that the parties knowingly and deliberately inserted the word "currently" into this text to ensure that the definition was not limited in scope to systems "consisting of" the three then-current components.

This reading of the treaty is further underscored by the Secretary Rogers' official letter transmitting the Treaty to the President, in which he expressly described Article II as serving illustrative purposes. Moreover, Secretary Rogers directly tied Article II to the issue of exotics by listing it under the heading "Future ABM Systems". Likewise, Ambassador Smith, on the day that the Treaty was signed, said that Article II "has a very important bearing on the problem of future systems."

C. Article III

Article III bans the deployment of all ABM systems or components other than the fixed, land-based components authorized at two agreed deployment sites. The negotiating record indicates that the Soviets accepted the U.S. proposal for the text of this provision with the explicit understanding that it would apply to then-current systems as well as exotic systems.

D. Article IV

Article IV limits "ABM systems or their components" deployed for test or development purposes to agreed test ranges. As with Article III, there is nothing in the broad language of this provision that either limits its application to then-current systems or excludes exotic systems from the ban on deployment for test or development purposes.

This provision reflected both side's appreciation that the ABM deployment limitations in the Treaty would be rendered meaningless if either side could circumvent them through the guise of development and testing. The concern shared by both sides was that a party might "deploy" ABM systems or components on a widespread (i.e., territorial) basis but claim that the systems or components so deployed were only development or test models. The negotiating record indicates that the two sides expressly agreed that fixed, land-based exotics could only be developed or tested at the agreed test ranges.

E. Agreed Statement D

Agreed Statement D begins by noting that it serves "to insure fulfillment of the obligations not to deploy ABM systems and their components except as provided in Article III . . . ." The parties then agree that "in the event ABM systems based on other physical principles [i.e., exotics] . . . are created" -- a permissible development with respect to fixed, land-based ABMs under Article III -- deployment of exotics is subject to discussion and agreement under the consultative and amendment provisions of the Treaty.

Under the Traditional Interpretation, Agreed Statement D serves a useful function in making explicit that which is otherwise implicit in the Treaty: if either side exercises its right (consistent with the Traditional Interpretation) to develop and test fixed, land-based "exotics", the Treaty expressly envisions that there would be a discussion and possible amendment to allow the deployment of such systems. Because the Treaty expressly permits the development and testing of fixed, land-based "exotics", it is reasonable for a separate document containing Agreed Statements to provide an explicit "roadmap" of the procedure to be followed in the event that the development and testing of such components proved to be successful.

There is another important purpose served by Agreed Statement D. It provides an authoritative interpretation of the Treaty by limiting the Treaty's restrictions on exotics to devices that meet both of the following two criteria: first, such a device must be based on "other physical principles"; and second, that it must include "components capable of substituting for ABM interceptors missiles, ABM launchers, or ABM radars" (Emphasis added). This explanation was extremely important to the United States because the Nixon Administration wanted to avoid any interpretation of the Treaty that would preclude the option of deploying "adjuncts" -- that is, elements of an ABM system (such as sensors or telescopes) which, in and of themselves, were not capable of substituting for an ABM radar, launcher, or missile.

In short, had Agreed Statement D not been included in the Treaty, the Soviet Union might have been able to argue that ABM adjuncts being developed, tested, or deployed by the U.S. were actually "components" that violated the Treaty.

F. Assessment of the Traditional Interpretation

The Traditional Interpretation incorporates the following interlocking network of restrictions preventing any direct or indirect territorial deployment.

- The direct deployment of then-current fixed, land-based ABM missiles, launchers or radars is limited by Article III to 200 launchers with associated radars at two specified locations.

- The indirect deployment of then-current ABM missiles, launchers or radars throughout either nation in the guise of development or test models is prohibited by Article IV. This provision confines such models to the agreed test ranges and allows no more than 15 test launchers.

- The direct deployment of "other" fixed, land-based ABMs including exotics, is prohibited by Article III.

- The indirect deployment of fixed, land-based ABMs in the guise of development or test models is prohibited by Article IV. This includes exotics.

- The deployment, as well as the development or testing, of all mobile ABM systems or components -- whether "exotic" or not -- is banned by Article V.

- Agreed Statement D, which was set forth in a separate document, complements these provisions by providing more detailed guidance in the event that the authorized development and testing of fixed, land-based exotics proves successful. It also provides interpretive guidance ensuring that adjuncts (i.e., components not capable of substituting for then current ABM components) are excluded from the prohibitions on testing, development, and deployment.

In short, the Traditional Interpretation provides a structure designed to preclude either party from achieving a result which is contrary to the express object and purposes of Article I of the Treaty; i.e., "not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense." Agreed Statement D complements this structure in terms of the procedure for addressing fixed, land-based exotics, while also ensuring that the Treaty does not preclude testing, development, and deployment of adjuncts.

II. The Reinterpretation

A. Article II

Sofaer acknowledges that it is "plausible" to read the definition of ABM systems in Article II(1) as including future systems, but asserts this provision also "can reasonably be read to mean that, for the purposes of the Treaty, an 'ABM system' is one that serves the functions described and that consists of the type of components that existed 'currently' (that is, at the time the Treaty was signed)." 99 Harv. L. Rev. at 1974 According to Sofaer's reading, the Article II(1) definition of ABM systems is limited to those systems based on physical principles in use in 1972.

Sofaer's reading of Article II flies directly in the face of the plain meaning of the provision because it converts an illustrative phrase into a limiting phrase through insertion of the conjunctive "and" before the phrase "currently consisting of." Sofaer, in effect, has created an ambiguity by adding a word to the text that does not appear therein. As this report has demonstrated, his view of Article II is directly contradicted by numerous statements during the ratification process in which Article II was cited by the Nixon Administration in connection with exotics. It is also contrary to the treatment of Article II in the negotiating record.

B. Implications For Articles V & III and Agreed Statement D

Sofaer concedes that the Treaty precludes deployment (but not testing and development) of all ABMs using exotics, but denies that this ban is found in the broad prohibitions of Article III (which precludes deployment of ABMs except for two fixed, land-based systems). His interpretation requires a series of assumptions about the Treaty:

- First, he assumes that the definition of "ABM systems and components" in Article II excludes exotics, an assumption that is compelled neither by the text nor the purpose of the Treaty. The negotiating record contradicts this claim.

- Second, on the basis of that assumption, he concludes that the prohibition against deployment of "ABM systems and components" in Articles III and V does not include exotics. The negotiating record also disproves this claim.

- Third, because he has acknowledged that the negotiating record supports a ban on deployment of exotics, some other provision of the Treaty must be found as a basis for that prohibition.

- Fourth, because Agreed Statement D discusses exotics, he assumes that it must be the sole source of the prohibition against their deployment.

His analysis of Agreed Statement D will not withstand close scrutiny. The only portion of the Agreed Statement that discusses deployment is the introductory clause, which sets forth the purpose of Agreed Statement D -- "to insure the fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III". It is readily apparent that this clause, by itself, does not prohibit deployment; rather, it is a mere statement of purpose introducing the subject of the Agreed Statement by referencing (not establishing) the obligation not to deploy ABMs except as provided in Article III.

A further problem for Sofaer's theory is that it is internally inconsistent. If, as Sofaer asserts, the term "ABM systems and components" is defined for purposes of the Treaty as excluding exotics, then the use of that term in Agreed Statement D also excludes exotics. If that were the case, the introductory clause of the provision could not serve as the basis for prohibiting deployment of such ABMs.

Under questioning from the Senate Armed Services Committee, Sofaer was unable to support his theory on the basis of the text of Agreed Statement D; rather, he relied on the"spirit" of the introductory clause. 1985 Senate Hearings at 187. In effect, he is asking us to believe that deployment of ABMs using exotics was not addressed in those portions of the Treaty, signed by the President Nixon and General Secretary Brezhnev, that broadly prohibit deployment of ABMs, but instead was covered only by the "spirit" -- not the express wording -- of a side agreement signed by the heads of the negotiating teams. To reach this result, he has had to read words into Article II that are not present, deprived Articles III and V of their plain meaning, created an inconsistency between his treatment of the same phrase in Article II and Agreed Statement D, and relied on on the "spirit" rather than the actual wording of Agreed Statement D.

Sofaer also asserts his interpretation of Agreed Statement D is required because the traditional view (that deployment of exotics is banned by Articles III and V) renders Agreed Statement

D superfluous, and therefore "violates accepted cannons of construction." Id. at 143. There are several problems with this theory:

- First, it overlooks at least two reasonable purposes for Agreed Statement D, discussed in the prior subsection: (1) providing a basis for distinguishing permissible "adjuncts" from prohibited "components," a distinction found nowhere else in treaty; and (2) removing any possible doubt that "exotics" tested and developed under Article IV in a fixed, land-based mode, were subject to discussion and further agreement prior to deployment.

- Second, it is misleading to imply that the Traditional Interpretation must fall because it "violates accepted canons of construction." The only such canon of international law cited by Sofaer is the norm that: "All words of the Treaty are, if reasonably possible, to be given a meaning, and rules of construction may not be resorted to to render them meaningless." 99 Harv. L. Rev. at 1976 n.12. This is a rather weak reed to rely on for purposes of giving a different meaning to a Treaty than that presented by the Executive Branch to the Senate at the time of ratification. Moreover, it does not provide a sound basis for rejecting the Traditional Interpretation. Some perspective on Sofaer's use of this norm of construction is provided by the following comment from Ian Brownlee, in his 1973 treatise, Principles of Public International Law, at 605:

> Jurists are in general cautious about formulating a code of "rules of interpretation", since the "rules" may become unwieldy instruments instead of the flexible aids which are required. Many of the "rules" and "principles" offered are general, question-begging, and contradictory. As with statutory interpretation, a choice of a "rule" . . . may in a given case involve a preliminary choice of meaning rather than a guide to interpretation. [Citations omitted]

Although the parties might have achieved the effect of Agreed Statement D through interpretation rather than an Agreed Statement, the purpose served by Agreed Statement D -- providing amplifying details for matters discussed broadly in the body of the Treaty -- is more than sufficient to avoid a construction that would render it "meaningless." Indeed, it is hardly remarkable that an Agreed Statement, set forth in a document separate from the main body of a Treaty, would cover the same subject as primary text, using somewhat different emphasis and a greater level of detail.

Finally, even assuming that Agreed Statement D duplicates matters covered elsewhere in the Treaty, Sofaer's analysis is deficient because he ignores the clear evidence in the negotiating record that Agreed Statement D was not redundant at the time it was adopted. At the time agreement was reached on Agreed Statement D, the ban on deployment in Article III had not yet been proposed by either side in a form that would have applied to exotics. Eventually, Article III was revised to serve this purpose. An agreement on Article III, however, was not achieved until shortly before the summit at which Nixon and Brezhev were scheduled to sign the Treaty. The negotiating documents reveal scheduled to sign the Treaty. The negotiating documents reveal that the issue, therefore, was not whether to add Agreed Statement D to the Treaty, but whether to delete it. It was retained for two reasons. First, it served the substantive purposes noted above. Second, because there was no inconsistency between Agreed Statement D and any other provision, it made little sense to reopen an issue with the Soviets by proposing deletion virtually on the eve of the summit.

C. Article IV

Another implication of Sofaer's Reinterpretation of the Treaty's text is that it would exempt exotics from the requirement in Article IV that all ABM development and testing be restricted to agreed test ranges. Thus either side could "deploy" ABMs using exotics such as lasers or particle beam weapons anywhere in their country and in any number as long as it claimed that the weapons so "deployed" were for development and test purposes.

Sofaer's reading would result in the following anomalies:

* The direct deployment of fixed, land-based ABM missiles, launchers and radars would be limited by Article III, but indirect deployments of fixed, land-based "exotics" in the guise of development or test models would be totally unconstrained -- either quantitatively or geographically.

- The direct deployment of mobile/space based ABMs involving missiles, launchers or radars would be banned by Article V, but there would be no constraint on the indirect deployment of mobile "exotics" under the guise of development and test models.

In short, if Sofaer's reading of the Treaty text were accurate, the two sides would have opened the door to deployment options directly contrary to the basic object and purpose articulated in Article I -- "not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense. . . ."

D. Implications For Other Provisions

The Sofaer Reinterpretation would also mean that prohibitions in other parts of the accord would not apply to "exotics" -- for example, the ban in Article IX against transferring "ABM systems or their components" to other states or deploying them outside one's national territory. One would then also presumably read Agreed Statement "G" as permitting the United States to provide other states with the blueprints or technical desriptions of "exotic" ABM systems and components. Here, too, there is an obvious problem of consistency. Is it logical that the Treaty would ban the transfer to or deployment in third party states of then-current ABM systems and components while leaving the door open to such actions for futuristic ABM systems and components?

III. CONCLUSION

The Reinterpretation identifies some ambiguities in the negotiating record and highlights provisions of the Treaty that might have been drafted more clearly. However, it produces an analysis of the treaty that is marked by inconsistencies in logic and conflicts with the the purposes of the Treaty. The Traditional Interpretation is internally consistent and in accord with the purposes of the Treaty and it is supported in a preponderance of the evidence in the negotiating document.

XI. APPENDIX B

SUMMARY OBSERVATIONS ON SOFAER'S MAY 11, 1987 REPORT ON THE NEGOTIATING RECORD

On May 13, 1987, the Administration released a new report by Judge Sofaer on the ABM Treaty negotiating record. This report is dated May 11, 1987. In the introduction to the report, Sofaer states:[1]

> The present report is an updated version of a study completed by this office in August 1986, and sent thereafter to the Senate along with relevant parts of the negotiating record. This version deals with arguments and evidence developed or discovered in recent months. No study of this subject can be treated as totally complete. Nothing said or found concerning the Treaty, however, has altered the conclusions reached in October 1985 that the Treaty text is ambiguous, and that the negotiating record establishes that the Soviet Union refused to agree to prohibit the development and testing of mobile ABM devices based on OPP ["other physical principles"].

Despite Sofaer's assertion that nothing in his latest report has altered the basic conclusions of his Reinterpretation, a careful review of this document identifies a number of instances in which Sofaer has made important new concessions supportive of the Traditional Interpretation.

The most significant change in the new report is Sofaer's retreat from his claim that Article III of the Treaty did not extend to exotics. In his August 6, 1986 report, Sofaer had maintained that Article III did not prohibit the deployment of exotic ABM systems or components.[2]

> In the subsequent negotiations, a change was made in Article III that made clearer than in earlier drafts that only those systems and components specified in the Article could be deployed. The provision did not,

> however, expressly prohibit the deployment of substitutes for "systems" or "components".

In his May 11, 1987 report, Sofaer now admits that:[3]

> Discussions during the negotiation of Agreed Statement D, and thereafter during the final drafting of Article III's introductory language, indicate that the parties believed that Articles I, II, and III together expressed their intention to bar deployment of all OPP devices. (emphasis in original)

In his previous report, Sofaer had taken note of -- but dismissed as inconclusive -- statements made by the lead Soviet negotiator on Article III to Ambassador Parsons, his American counterpart, at the April 28, 1972 meeting at which agreement was reached on the article:[4]

> Parsons asked if he understood correctly that the Soviets "could probably agree to a formulation undertaking not to deploy ABM systems or their components except as the Article would provide." Grinevsky said that they could, as this would ban 'other systems'.

Sofaer includes this memcon in his latest report but makes a new concession that confirms that by "other systems", Grinevsky meant exotic ABM components:[5]

[Excerpt from Sofaer's May 11, 1987 report]

> The parties were using the words "other" and "future" interchangeably, in that both were meant to signify a system that served the ABM function but that relied (or in the case of "future" systems that might rely) on one or more substitute components.

This explanation makes clear that when Grinevsky accepted the U.S. proposal for Article III on April 28, noting specifically that it would ban "other systems," the Soviet side agreed that Article III covered exotics.

Sofaer's concession on Article III exposes a fundamental deficiency in his entire line of reasoning. If Article III prevents the deployment of exotics, then the phrase "ABM systems or their components," as it appears in that provision, necessarily incorporates exotics. Since the definitions of terms used in the Treaty are provided exclusively by Article II, the phrase "ABM systems or their components" must have the same meaning in Article II and Article III. In other words, the definition of "ABM systems or their components" in Article II necessarily includes exotics. Because the definitions provided in Article II must be consistently applied wherever they appear in the Treaty, this would logically mean that the words "ABM systems" in Article V also include exotics -- thereby prohibiting the development, testing or deployment of ABMs using exotics. In short, if it is established that Article III covers exotics, then the case for the Reinterpretation is undermined.

Sofaer recognizes this problem and, in another extraordinary concession, admits that it allows one to "make an arguable case" for the Traditional Interpretation:[6]

[Excerpt from May 11, 1987 Sofaer Report]

> The argument could be made that this change showed that the Soviets had come to accept the U.S. view that "ABM systems" should be defined throughout the Treaty in purely functional terms. This assumed result, together with the references by Karpov to "collateral" obligations in the drafting of Article II(1), and his reference on September 15 to the inclusion of "any type of future component" in Article V(1), could make an arguable case for the proposition that Article V(1) should be viewed in the final analysis as applying fully to all mobile OPP devices. (emphasis added)

Nevertheless, Sofaer stands by the Reinterpretation, declaring:[7]

> This line of argument, based as it is on scattered, oral statements and unexpressed intentions, fails to undercut the strong case that the Soviets had not agreed to the U.S. view on all these issues.

With regard to this statement by Sofaer, it should be emphasized that the so-called "scattered, oral statements" by Soviet officials were in point of fact statements made by the senior Soviet negotiators tasked with reaching agreement on specific articles of the Treaty which were communicated to their American counterparts during precisely those formal negotiating sessions at which agreement was reached on these provisions. Moreover, these statement were communicated to the U.S. side for the express purpose of establishing the intent of the Parties as to the interpretation of the meaning and effect of the texts on which agreement was then being reached.

Sofaer insists that even though he now concedes that exotics are covered under Article III:[8]

> This fact does not establish, however, that Article II(1) defined ABM systems, as used in the Treaty text, to include all OPP devices.

This assertion not only flies in the face of logic, it is also inconsistent with yet another significant concession in his new report -- Sofaer's admission that the language of Article II is "functional." In his May 11, 1987 report, Sofaer states:[9]

> The Parties intended ultimately to regulate all ABM devices that could perform the ABM function, as reflected in the functional language of Article II(1).

In short, Sofaer is now conceding that Article II was expressly drafted by the two sides to reflect their recognition that there were going to be exotic ABM systems and that Article II was therefore made "functional" in scope. This concession forces Sofaer to try to reconcile his admission that the Soviets intended Article II to be "functional" in scope with his insistence that they did not intend Article II to limit "any ABM system other than the ones currently consisting of ABM missiles, launchers, and radars."[10]

Sofaer's approach to this appears to be to suggest that the Soviet side agreed to draft Article II in a functional form in anticipation of the need for limits on future systems only after achieving a consensus with the U.S. side that the question of agreeing on precise limitations would be deferred until such time as such systems began to be developed and tested pursuant to Agreed Statement D. As noted above, Sofaer states that, "The Parties intended _ultimately_ to regulate all ABM devices that could perform the ABM function, as reflected in the functional language of Article II(1)."[11] (emphasis added)

Sofaer fails to explain how Article II could have such a bifurcated effect -- that is, banning the deployment of exotics under Article III immediately upon the Treaty's taking effect while reserving until some future date the question of additional limitations on exotics in the area of development or testing. In short, Sofaer's position on the applicability of Article II to other provisions in the Treaty is inconsistent and unpersuasive. In conjunction with his new-found recognition that Article III establishes limitations on exotics, Sofaer's acknowledgement of the "functional" scope of Article II is devastating to his entire Reinterpretation theory.

It should be noted, though, that in this latest version of his analysis, Sofaer does take note of several aspects of the negotiating record which had been omitted in his August 1986 memo. These include:

- Guidance provided the U.S. negotiators in August, 1971 in Paragraph 5 of National Security Decision Memorandum 127 (which enjoined the U.S. negotiators from engaging in a detailed discussion of secret U.S. programs in the area of exotic ABMs).
- Soviet efforts to probe for these U.S. secrets.
- The sequence of events with respect to reaching agreement on Agreed Statement D and Article III and the effect of this chronology on Sofaer's arguments about the former's alleged "redundancy."

In addition, the new Sofaer report contains a large volume of new material not previously made available to the Senate. This material provides new information on a number of points, including communications between Dr. Kissinger and Ambassador Smith, reports filed by the U.S. Delegation when it was back in Washington during breaks in the negotiations, details of internal U.S. Government (USG) communications related to the scope of Article IV, and internal USG communications in which some officials questioned whether the September 1971 Graybeal/Karpov understanding on Article V(1) extended to exotics.

Sofaer's recent discovery of documents indicating that some U.S. officials, including the JCS representative, General Allison, may have raised questions in the fall and winter of 1971-1972 as to whether the Soviet Union had agreed in September, 1971 to include exotics under the limitations of Article V(1) complements his case for the Reinterpretation. However, these documents must be weighed against the clear evidence in the negotiating record that when the Treaty was signed in May, 1972, the U.S. Delegation collectively and formally agreed that Article V(1) in fact achieved this result.

The new documents discovered by Sofaer also reveal that when the White House was preparing for the Treaty ratification proceedings after the Treaty was signed, it did not question the comprehensive and restrictive nature of Article V(1). It is also important to reiterate that during the 1972 ratification hearings General Palmer testified to the Senate Armed Services Committee that with regard to the ban under Article V(1) on development and testing on mobile/space-based exotics, "The Chiefs were aware of that and had agreed to that and that was a fundamental part of the final agreement." Finally, it is also worth noting that the JCS representative, General Allison, has recently testified before the Senate Foreign Relations and Judiciary Committees that Article V(1) covers exotics.

The discovery of these documents adds to the body of information now available to the Senate. The new material does not, however, provide a basis for the Reinterpretation. In sum, although the May 11, 1987 Sofaer report is more comprehensive, the preponderance of evidence in the negotiating record still supports the Senate's original understanding of the Treaty, i.e., the Traditional Interpretation.

FOOTNOTES

1. Office of the Legal Advisor, Department of State, "The ABM Treaty, Part I: Treaty Language and Negotiating History," May 11, 1987, at 3.

2. "Application of the ABM Treaty to Systems and Components Based on Other Physical Principles," August 6, 1986, Memorandum prepared by Abraham D. Sofaer, Legal Adviser, Department of State, at 44. [hereinafter referred to as "Sofaer".]

3. _Id_. at 6.

4. A-873 (April 28, 1972), at 2-3.

5. Sofaer at 58.

6. _Id_., at 71.

7. _Id_.

8. _Id_., at 6.

9. _Id_.

10. *Id*.

11. *Id*.

Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems

Signed at Moscow May 26, 1972
Ratification advised by U.S. Senate August 3, 1972
Ratified by U.S. President September 30, 1972
Proclaimed by U.S. President October 3, 1972
Instruments of ratification exchanged October 3, 1972
Entered into force October 3, 1972

The United States of America and the Union of Soviet Socialist Republics, hereinafter referred to as the Parties,

Proceeding from the premise that nuclear war would have devastating consequences for all mankind,

Considering that effective measures to limit anti-ballistic missile systems would be a substantial factor in curbing the race in strategic offensive arms and would lead to a decrease in the risk of outbreak of war involving nuclear weapons,

Proceeding from the premise that the limitation of anti-ballistic missile systems, as well as certain agreed measures with respect to the limitation of strategic offensive arms, would contribute to the creation of more favorable conditions for further negotiations on limiting strategic arms,

Mindful of their obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons,

Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to take effective measures toward reductions in strategic arms, nuclear disarmament, and general and complete disarmament,

Desiring to contribute to the relaxation of international tension and the strengthening of trust between States,

Have agreed as follows:

Article I

1. Each party undertakes to limit anti-ballistic missile (ABM) systems and to adopt other measures in accordance with the provisions of this Treaty.

2. Each Party undertakes not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense, and not to deploy ABM systems for defense of an individual region except as provided for in Article III of this Treaty.

Article II

1. For the purpose of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of:

(a) ABM interceptor missiles, which are interceptor missiles constructed and deployed for an ABM role, or of a type tested in an ABM mode;

(b) ABM launchers, which are launchers constructed and deployed for launching ABM interceptor missiles; and

(c) ABM radars, which are radars constructed and deployed for an ABM role, or of a type tested in an ABM mode.

2. The ABM system components listed in paragraph 1 of this Article include those which are:

(a) operational;
(b) under construction;
(c) undergoing testing;
(d) undergoing overhaul, repair or conversion; or
(e) mothballed.

Article III

Each Party undertakes not to deploy ABM systems or their components except that:

(a) within one ABM system deployment area having a radius of one hundred and fifty kilometers and centered on the Party's national capital, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, and (2) ABM radars within no more than six ABM radar complexes, the area of each complex being circular and having a diameter of no more than three kilometers; and

(b) within one ABM system deployment area having a radius of one hundred and fifty kilometers and containing ICBM silo launchers, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, (2) two large phased-array ABM radars comparable in potential to corresponding ABM radars operational or under construction on the date of signature of the Treaty in an ABM system deployment area containing ICBM silo launchers, and (3) no more than eighteen ABM radars each having a potential less than the potential of the smaller of the above-mentioned two large phased-array ABM radars.

Article IV

The limitations provided for in Article III shall not apply to ABM systems or their components used for development or testing, and located within current or additionally agreed test ranges. Each Party may have no more than a total of fifteen ABM launchers at test ranges.

Article V

1. Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.

2. Each Party undertakes not to develop, test, or deploy ABM launchers for launching more than one ABM interceptor missile at a time from each launcher, not to modify deployed launchers to provide them with such a capability, not to develop, test, or deploy automatic or semi-automatic or other similar systems for rapid reload of ABM launchers.

Article VI

To enhance assurance of the effectiveness of the limitations on ABM systems and their components provided by the Treaty, each Party undertakes:

(a) not to give missiles, launchers, or radars, other than ABM interceptor missiles, ABM launchers, or ABM radars, capabilities to counter strategic ballistic missiles or their elements in flight trajectory, and not to test them in an ABM mode; and

(b) not to deploy in the future radars for early warning of strategic ballistic missile attack except at locations along the periphery of its national territory and oriented outward.

Article VII

Subject to the provisions of this Treaty, modernization and replacement of ABM systems or their components may be carried out.

Article VIII

ABM systems or their components in excess of the numbers or outside the areas specified in this Treaty, as well as ABM systems or their components prohibited by this Treaty, shall be destroyed or dismantled under agreed procedures within the shortest possible agreed period of time.

Article IX

To assure the viability and effectiveness of this Treaty, each Party undertakes not to transfer to other States, and not to deploy outside its national territory, ABM systems or their components limited by this Treaty.

Article X

Each Party undertakes not to assume any international obligations which would conflict with this Treaty.

Article XI

The Parties undertake to continue active negotiations for limitations on strategic offensive arms.

Article XII

1. For the purpose of providing assurance of compliance with the provisions of this Treaty, each Party shall use national technical means of verification at its disposal in a manner consistent with generally recognized principles of international law.

2. Each Party undertakes not to interfere with the national technical means of verification of the other Party operating in accordance with paragraph 1 of this Article.

3. Each Party undertakes not to use deliberate concealment measures which impede verification by national technical means of compliance with the provisions of this Treaty. This obligation shall not require changes in current construction, assembly, conversion, or overhaul practices.

Article XIII

1. To promote the objectives and implementation of the provisions of this Treaty, the Parties shall establish promptly a Standing Consultative Commission, within the framework of which they will:

(a) consider questions concerning compliance with the obligations assumed and related situations which may be considered ambiguous;

(b) provide on a voluntary basis such information as either Party considers necessary to assure confidence in compliance with the obligations assumed;

(c) consider questions involving unintended interference with national technical means of verification;

(d) consider possible changes in the strategic situation which have a bearing on the provisions of this Treaty;

(e) agree upon procedures and dates for destruction or dismantling of ABM systems or their components in cases provided for by the provisions of this Treaty;

(f) consider, as appropriate, possible proposals for further increasing the viability of this Treaty; including proposals for amendments in accordance with the provisions of this Treaty;

(g) consider, as appropriate, proposals for further measures aimed at limiting strategic arms.

2. The Parties through consultation shall establish, and may amend as appropriate, Regulations for the Standing Consultative Commission governing procedures, composition and other relevant matters.

Article XIV

1. Each Party may propose amendments to this Treaty. Agreed amendments shall enter into force in accordance with the procedures governing the entry into force of this Treaty.

2. Five years after entry into force of this Treaty, and at five-year intervals thereafter, the Parties shall together conduct a review of this Treaty.

Article XV

1. This Treaty shall be of unlimited duration.

2. Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. It shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty. Such notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests.

Article XVI

1. This Treaty shall be subject to ratification in accordance with the constitutional procedures of each Party. The Treaty shall enter into force on the day of the exchange of instruments of ratification.

2. This Treaty shall be registered pursuant to Article 102 of the Charter of the United Nations.

DONE at Moscow on May 26, 1972, in two copies, each in the English and Russian languages, both texts being equally authentic.

FOR THE UNITED STATES OF AMERICA	**FOR THE UNION OF SOVIET SOCIALIST REPUBLICS**
RICHARD NIXON	**L. I. BREZHNEV**
President of the United States of America	*General Secretary of the Central Committee of the CPSU*

Agreed Statements, Common Understandings, and Unilateral Statements Regarding the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missiles

1. Agreed Statements

The document set forth below was agreed upon and initialed by the Heads of the Delegations on May 26, 1972 (letter designations added):

AGREED STATEMENTS REGARDING THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS ON THE LIMITATION OF ANTI-BALLISTIC MISSILE SYTEMS

[A]

The Parties understand that, in addition to the ABM radars which may be deployed in accordance with subparagraph (a) of Article III of the Treaty, those non-phased-array ABM radars operational on the date of signature of the Treaty within the ABM system deployment area for defense of the national capital may be retained.

[B]

The Parties understand that the potential (the product of mean emitted power in watts and antenna area in square meters) of the smaller of the two large phased-array ABM radars referred to in subparagraph (b) of Article III of the Treaty is considered for purposes of the Treaty to be three million.

[C]

The Parties understand that the center of the ABM system deployment area centered on the national capital and the center of the ABM system deployment area containing ICBM silo launchers for each Party shall be separated by no less than thirteen hundred kilometers.

[D]

In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty.

[E]

The Parties understand that Article V of the Treaty includes obligations not to develop, test or deploy ABM interceptor missiles for the delivery by each ABM interceptor missile of more than one independently guided warhead.

[F]

The Parties agree not to deploy phased-array radars having a potential (the product of mean emitted power in watts and antenna area in square meters) exceeding three million, except as provided for in Articles III, IV and VI of the Treaty, or except for the purposes of tracking objects in outer space or for use as national technical means of verification.

[G]

The Parties understand that Article IX of the Treaty includes the obligation of the US and the USSR not to provide to other States technical descriptions or blue prints specially worked out for the construction of ABM systems and their components limited by the Treaty.

2. Common Understandings

Common understanding of the Parties on the following matters was reached during the negotiations:

A. Location of ICBM Defenses

The U.S. Delegation made the following statement on May 26, 1972:

Article III of the ABM Treaty provides for each side one ABM system deployment area centered on its national capital and one ABM system deployment area containing ICBM silo launchers. The two sides have registered agreement on the following statement: "The Parties understand that the center of the ABM system deployment area centered on the national capital and the center of the ABM system deployment area containing ICBM silo launchers for each Party shall be separated by no less than thirteen hundred kilometers." In this connection, the U.S. side notes that its ABM system deployment area for defense of ICBM silo launchers, located west of the Mississippi River, will be centered in the Grand Forks ICBM silo launcher deployment area. (See Agreed Statement [C].)

B. ABM Test Ranges

The U.S. Delegation made the following statement on April 26, 1972:

Article IV of the ABM Treaty provides that "the limitations provided for in Article III shall not apply to ABM systems or their components used for development or testing, and located within current or additionally agreed test ranges." We believe it would be useful to assure that there is no misunderstanding as to current ABM test ranges. It is our understanding that ABM test ranges encompass the area within which ABM components are located for test purposes. The current U.S. ABM test ranges are at White Sands, New Mexico, and at Kwajalein Atoll, and the current Soviet ABM test range is near Sary Shagan in Kazakhstan. We consider that non-phased array radars of types used for range safety or instrumentation purposes may be located outside of ABM test ranges. We interpret the reference in Article IV to "additionally agreed test ranges" to mean that ABM components will not be located at any other test ranges without prior agreement between our Governments that there will be such additional ABM test ranges.

On May 5, 1972, the Soviet Delegation stated that there was a common understanding on what ABM test ranges were, that the use of the types of non-ABM radars for range safety or instrumentation was not limited under the Treaty, that the reference in Article IV to "additionally agreed" test ranges was sufficiently clear, and that national means permitted identifying current test ranges.

C. Mobile ABM Systems

On January 29, 1972, the U.S. Delegation made the following statement:

> Article V(1) of the Joint Draft Text of the ABM Treaty includes an undertaking not to develop, test, or deploy mobile land-based ABM systems and their components. On May 5, 1971, the U.S. side indicated that, in its view, a prohibition on deployment of mobile ABM systems and components would rule out the deployment of ABM launchers and radars which were not permanent fixed types. At that time, we asked for the Soviet view of this interpretation. Does the Soviet side agree with the U.S. side's interpretation put forward on May 5, 1971?

On April 13, 1972, the Soviet Delegation said there is a general common understanding on this matter.

D. Standing Consultative Commission

Ambassador Smith made the following statement on May 22, 1972:

> The United States proposes that the sides agree that, with regard to initial implementation of the ABM Treaty's Article XIII on the Standing Consultative Commission (SCC) and of the consultation Articles to the Interim Agreement on offensive arms and the Accidents Agreement,[1] agreement establishing the SCC will be worked out early in the follow-on SALT negotiations; until that is completed, the following arrangements will prevail: when SALT is in session, any consultation desired by either side under these Articles can be carried out by the two SALT Delegations; when SALT is not in session, *ad hoc* arrangements for any desired consultations under these Articles may be made through diplomatic channels.

Minister Semenov replied that, on an *ad referendum* basis, he could agree that the U.S. statement corresponded to the Soviet understanding.

E. Standstill

On May 6, 1972, Minister Semenov made the following statement:

> In an effort to accommodate the wishes of the U.S. side, the Soviet Delegation is prepared to proceed on the basis that the two sides will in fact observe the obligations of both the Interim Agreement and the ABM Treaty beginning from the date of signature of these two documents.

In reply, the U.S. Delegation made the following statement on May 20, 1972:

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[1] See Article 7 of Agreement to Reduce the Risk of Outbreak of Nuclear War Between the United States of America and the Union of Soviet Socialist Republics, signed Sept. 30, 1971.

The U.S. agrees in principle with the Soviet statement made on May 6 concerning observance of obligations beginning from date of signature but we would like to make clear our understanding that this means that, pending ratification and acceptance, neither side would take any action prohibited by the agreements after they had entered into force. This understanding would continue to apply in the absence of notification by either signatory of its intention not to proceed with ratification or approval.

The Soviet Delegation indicated agreement with the U.S. statement.

3. Unilateral Statements

The following noteworthy unilateral statements were made during the negotiations by the United States Delegation:

A. Withdrawal from the ABM Treaty

On May 9, 1972, Ambassador Smith made the following statement:

> The U.S. Delegation has stressed the importance the U.S. Government attaches to achieving agreement on more complete limitations on strategic offensive arms, following agreement on an ABM Treaty and on an Interim Agreement on certain measures with respect to the limitation of strategic offensive arms. The U.S. Delegation believes that an objective of the follow-on negotiations should be to constrain and reduce on a long-term basis threats to the survivability of our respective strategic retaliatory forces. The USSR Delegation has also indicated that the objectives of SALT would remain unfulfilled without the achievement of an agreement providing for more complete limitations on strategic offensive arms. Both sides recognize that the initial agreements would be steps toward the achievement of more complete limitations on strategic arms. If an agreement providing for more complete strategic offensive arms limitations were not achieved within five years, U.S. supreme interests could be jeopardized. Should that occur, it would constitute a basis for withdrawal from the ABM Treaty. The U.S. does not wish to see such a situation occur, nor do we believe that the USSR does. It is because we wish to prevent such a situation that we emphasize the importance the U.S. Government attaches to achievement of more complete limitations on strategic offensive arms. The U.S. Executive will inform the Congress, in connection with Congressional consideration of the ABM Treaty and the Interim Agreement, of this statement of the U.S. position.

B. Tested in ABM Mode

On April 7, 1972, the U.S. Delegation made the following statement:

> Article II of the Joint Text Draft uses the term "tested in an ABM mode," in defining ABM components, and Article VI includes certain obligations concerning such testing. We believe that the sides should have a common understanding of this phrase. First, we would note that the testing provisions of the ABM Treaty are intended to apply to testing which occurs after the date of signature of the Treaty, and not to any testing which may have occurred in the past. Next, we would amplify the remarks we have made on this subject during the previous Helsinki phase by setting forth the objectives which govern the U.S. view on the subject, namely, while prohibiting testing of non-ABM components for ABM purposes: not to prevent testing of ABM components, and not to prevent testing of non-ABM components for

non-ABM purposes. To clarify our interpretation of "tested in an ABM mode," we note that we would consider a launcher, missile or radar to be "tested in an ABM mode" if, for example, any of the following events occur: (1) a launcher is used to launch an ABM interceptor missile, (2) an interceptor missile is flight tested against a target vehicle which has a flight trajectory with characteristics of a strategic ballistic missile flight trajectory, or is flight tested in conjunction with the test of an ABM interceptor missile or an ABM radar at the same test range, or is flight tested to an altitude inconsistent with interception of targets against which air defenses are deployed, (3) a radar makes measurements on a cooperative target vehicle of the kind referred to in item (2) above during the reentry portion of its trajectory or makes measurements in conjunction with the test of an ABM interceptor missile or an ABM radar at the same test range. Radars used for purposes such as range safety or instrumentation would be exempt from application of these criteria.

C. No-Transfer Article of ABM Treaty

On April 18, 1972, the U.S. Delegation made the following statement:

In regard to this Article [IX], I have a brief and I believe self-explanatory statement to make. The U.S. side wishes to make clear that the provisions of this Article do not set a precedent for whatever provision may be considered for a Treaty on Limiting Strategic Offensive Arms. The question of transfer of strategic offensive arms is a far more complex issue, which may require a different solution.

D. No Increase in Defense of Early Warning Radars

On July 28, 1970, the U.S. Delegation made the following statement:

Since Hen House radars [Soviet ballistic missile early warning radars] can detect and track ballistic missile warheads at great distances, they have a significant ABM potential. Accordingly, the U.S. would regard any increase in the defenses of such radars by surface-to-air missiles as inconsistent with an agreement.

ESSAY

Interpreting "Interpretation": The President, the Senate, and When Treaty Interpretation Becomes Treaty Making

*Michael J. Glennon**

Can the President, by relying upon a secret negotiating record not transmitted to the Senate when it approved a given treaty, "interpret" the treaty in a manner at odds with what the Senate then understood to be the treaty's meaning?

Traditionally, the President has been seen as having broad authority to construe the words of a treaty.[1] The Senate has been said to have no role in the interpretive process.[2] The role of the Senate has been seen as confined to the advice-and-consent function conferred by the Constitution.[3]

However, the President's interpretive power is not unlimited. He cannot make an altogether new treaty and dispense with the requirement of Senate advice and consent by calling that treaty an "interpretation" of an earlier one. Nor can he amend an earlier treaty and escape the requirement of Senate approval (to what is in reality a new treaty) by calling the amendment an "interpretation." The President's own semantic denomination of his act cannot of itself control what procedure is required constitutionally. At some point his authority ends and the Senate's begins; at some point an interpretation becomes a new treaty or an amendment to the old one. But when does this occur?

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[1] Restatement (Revised) of Foreign Relations Law § 326 (1) (A.L.I. Tent. Draft No. 6, Vol. 2, Apr. 12, 1985) [hereafter Revised Restatement] provides that the President "has authority to determine the interpretation of an international agreement to be asserted by the United States in its relations with other states."

[2] *Id.*, Reporters' Note 1.

[3] U.S. Const. art. II, § 2, cl. 2 provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

At the outset, one should recall that the United States' *domestic* obligations under a given international agreement need not necessarily correspond to its *international* obligations. This principle is clear under customary international law, and is of course true with respect to every nation. Perhaps the best example of an agreement giving rise to disparate obligations within the two different legal systems is an agreement entered into in violation of a nation's domestic law. Under international law, such an agreement can be binding internationally notwithstanding the domestic violation. Indeed, such an agreement *is* binding internationally unless the agreement violates a "fundamental rule" of domestic law and that violation is "manifest."[4] At the same time, the domestic rule is, *ex hypothesi*, contravened. Domestically, such an agreement is thus void; internationally, it is binding.

This consideration is important to bear in mind because, during the dispute concerning interpretation of the ABM Treaty, the State Department Legal Adviser, Abraham Sofaer, repeatedly cautioned the Senate against endorsing a principle that would "[deprive] our nation of the benefits of mutuality of obligation in its treaty relations."[5] "The United States," the Legal Adviser testified, "would be put at a significant disadvantage if the President is subject to stricter constraints, as a result of internal understandings of the Senate, than those which apply to other parties."[6] It is important, he appeared to suggest, that the Senate not endorse a principle that could result in one obligation for the United States and another for a treaty partner.

Surely all nations have a tidiness interest; it ill behooves a nation that takes law seriously to skirt juridical schizophrenia by readily permitting itself to undertake dissonant domestic and international obligations. Yet the Legal Adviser seemed to assume wrongly that the possibility of disparity was some novel idea propounded by a few Senators, rather than a contingency inherent in the nature of the relationship between the two legal systems. Moreover, he seemed to assume wrongly that the interest in harmony between the two legal regimes is the *only* interest at stake. Surely a far greater interest is involved: surely the interest of every state — and the United States in particular — in preserving the integrity of the domestic legal order must prevail over concerns about mere orderliness. The United States Constitution places limits on the President's power. Whatever international law may say about the *international* nature of an obligation undertaken by the United States, those limits apply domestically and must be respected.

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[4] *See* Vienna Convention on the Law of Treaties, art. 46, UN Doc. A/Conf. 39/29 (1969) [hereafter Vienna Convention].

[5] A. Sofaer, State Department Legal Adviser, testimony before a joint hearing of the Senate Committee on Foreign Relations and the Senate Committee on the Judiciary, at 28 (Mar. 26, 1987) (unpublished Committee transcript, on file with the *U.C. Davis Law Review*) [hereafter Sofaer Testimony].

[6] *Id.*

In the ABM Treaty dispute, curiously, the Administration was not truly concerned about a lack of mutuality of *international* obligation. Its whole point to the Senate was that United States and Soviet negotiators did indeed have a meeting of the minds in 1972, and that the meaning of the treaty in force in 1987 was the meaning on which the negotiators had secretly agreed — not the meaning described to the Senate in 1972 by Administration spokesmen, not the meaning identified in 1972 by the two Senate opponents of the treaty as a reason for voting against it. That meaning, which would have prohibited testing and development of the exotic, space-based laser technologies comprising the Strategic Defense Initiative, or "Star Wars," may have been *inferred* by the Senate, but the Senate was wrong — or more precisely, misled. "[E]rrors sometimes occur," the Legal Adviser testified, "people sometime [sic] exaggerate, and misunderstandings take place."[7] His fundamental argument, therefore, was that however clear the ratification record of the treaty, however clear subsequent practice of the parties, the secret negotiating record was dispositive of the treaty's meaning.[8]

But dispositive in which legal system — international law or domestic, constitutional law? *TIME* magazine reasonably drew the conclusion that the Legal Adviser's reference was to both systems; he was, after all, giving testimony concerning the propriety of a measure that undertook to describe principles of treaty interpretation "[u]nder the United States Constitution."[9] Yet, in a letter to the editor of *TIME*, the Legal Adviser disclaimed any intent to address the domestic issues:

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[7] *Id.* at 29.

[8] Administration supporters of the "broad" interpretation and Senate proponents of the "narrow" interpretation both contended that the text of the treaty supported their interpretation, and allowed that, in the event of ambiguities, reference to extrinsic sources was permissible. Certain Senators opposing the Administration, however, disputed the propriety of reference to an untransmitted, secret negotiating record to resolve textual ambiguities.

[9] S. Res. 167, 100th Cong., 1st Sess. § 2(2)(A) (1987).

> You say that I "claimed that nothing the Administration tells the Senate during the ratification process is binding." My testimony, however, was addressed to the effect of the Senate's ratification record on international *obligations* toward the other party to a treaty, not the obligations of the President toward the Senate under the U.S. constitutional structure."[10]

With all due respect to Mr. Sofaer, this simply is not true. His testimony is replete with commentary concerning the "obligations of the President toward the Senate under the U.S. constitutional structure."[11] In any event, analysis is advanced by distinguishing between the different effects under the different systems, and the distinction serves to highlight three central issues arising within the domestic legal system.

First, is it within the President's *constitutional* power to enter into a treaty different than the one approved by the Senate? In effect, that different treaty is not a treaty but an executive agreement; the issue is whether that executive agreement falls within the scope of his sole power under the Constitution. The President's very act of transmitting the *treaty* for Senate advice and consent would seem to imply his own answer; constitutionally, if the treaty can be entered into as an executive agreement, why seek Senate approval? Senate Resolution 167 leaves little room for quarrel: "[I]f, following Senate advice and consent, the President proceeds to ratify a treaty, the President may ratify only the treaty to which the Senate advised and consented."[12]

Second, what weight is to be accorded the negotiating record in interpreting the President's constitutional obligations? Before addressing the substantive issue, looking closely at exactly what the term "negotiating record" means is worthwhile. In reality, no genuine "negotiating record" was compiled at the time the ABM Treaty was ratified. Rather, the "record" assembled was put together only recently — through an office-to-office survey conducted by personnel of the Legal Adviser. Normally, "negotiating record" is a term of art used to describe an *agreed* negotiating record, since it is only the joint intent of the parties that has significance under international law. Notes unilaterally compiled by one party cannot control a treaty's meaning.

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[10] TIME, Apr. 27, 1987, at 10.

[11] Mr. Sofaer comments on the Framers' intent with respect to the Treaty Clause. *See* Sofaer Test. *supra* note 5, at 46. He proceeds to address Professor Henkin's remarks on the role of the President and the Senate. *See id.* at 47. He raises a core constitutional question: "what is the treaty that is the law that the President must faithfully execute?" *Id.* He then talks about constitutional requirements concerning the inclusion of Senate-added conditions in the resolution of ratification and constitutional requirements concerning their inclusion by the President in the instrument of ratification. *See id.* at 53-54. He describes certain elements of the ratification record as "purely domestic documents." *Id.* at 55-56. He talks about the President's "responsibilities to enforce the laws and to conduct the foreign affairs of the United States. . . ." *Id.* at 58. He addresses the "allocation of powers" that "the nation has developed." *Id.* at 59. Finally, Mr. Sofaer asserts explicitly that "when [the Senate] gives its advice and consent to a treaty, it is to the treaty that was made, irrespective of the explanations it is provided." *Id.* at 62.

[12] S. Res. 167, 100th Cong., 1st Sess. § 2(2)(A) (1987).

In addition, there is no guarantee that Mr. Sofaer's staff was able to compile a complete and accurate record of the ABM Treaty negotiations. Mr. Sofaer candidly described this process in testimony before the House Foreign Affairs Committee in 1985. He said that he and his staff "obtained from various sources *everything that we could find* that might be relevant to the issue of future systems and components." Yet all must realize that the collage may represent far less than a complete, accurate picture of what actually transpired during the ABM Treaty negotiations.

Finally, even if — as seems unlikely — every piece of that disjointed record was recovered, what reason is there to believe that the American negotiators chose to reduce to writing all relevant materials bearing upon this question? Evidently the members of the American negotiating team themselves never believed that their instructions, responses, and various and sundry musings would someday be viewed as dispositive concerning the treaty's meaning; otherwise, would they not have taken more care in assembling a single, complete, and cohesive record? For these reasons, therefore, reference to the "negotiating record" of the ABM Treaty presented threshold, fact-related difficulties. Even if those difficulties could be overcome, substantive constitutional hurdles concerning its relevance remained. Senate Resolution 167 addressed those issues directly: "[T]he Senate's understanding of a treaty cannot be informed by matters of which it is not aware, such as private statements made during the negotiations that were not communicated to the Senate."

This formulation is eminently reasonable. Although Senate Resolution 167 does not expressly address the issue, it would permit a secret negotiating record, not transmitted to the Senate when it approved a treaty, to be taken into account when that record is not inconsistent with the Senate's understanding of a treaty's meaning. However, that would be disallowed when the Senate understood otherwise, as reflected in the treaty's legislative history. Then, the Senate's understanding would control, as indeed it should. Legislative intent is reflected by legislative history, and an untransmitted negotiating record by definition is not part of the legislative history.

Third, how is the Senate's understanding to be assessed? The question, again, is asked for *constitutional* purposes. To say, as the Legal Adviser did,[13] that formal communication to the other party is required is to say what need be done to firm up an *international* obligation. At issue here is the President's obligation vis-à-vis the Senate. In this domestic context, there is no reason to insist that the Senate make formal its understanding of the treaty's meaning. As Senate Resolution 167 put it:

> [T]he understanding of the Senate is manifested by any formal expression of understanding by the Senate, as well as by other evidence of what the Senate understood the treaty to mean, including Senate approval or acceptance of, or Senate acquiescence in, interpretations of the treaty by the executive branch communicated to the Senate. . . .[14]

As Senate Resolution 167 indicates, if the Senate proceeds to approve a treaty based on a certain understanding, that understanding controls. This is the rule of section 314 of the *Revised Restatement*, which imposes no requirement that the Senate's understanding be reduced to a formal condition. This rule is reiterated in comment *d* of the *Revised Restatement*.[15] A contrary rule would be illogical: the reason that the understanding in question is not reduced to a formal condition is that the Senate considers the meaning of the treaty obvious; formal conditions are appropriate where the meaning is not obvious. The Administration's position would require that the Senate clarify -- indeed, clarify formally, through an explicit condition to its consent — precisely what the Senate views as being *beyond* reasonable disagreement. Normally, of course, the Senate conditions its consent to a treaty for the purpose of making some change in the treaty. Thus the Senate has no reason to condition its consent to a treaty when it believes that the treaty's meaning is clear. Yet the Administration views those matters about which a genuine consensus exists as necessitating formal clarification! The argument is difficult to take seriously, for on analysis it is seen to assume the very point in controversy. It assumes that the ABM Treaty in 1972 was properly accorded a "broad" interpretation, and that the Senate could change that interpretation if it so wished.

Constitutionally, one can reasonably conclude that the President cannot, by relying upon a secret negotiating record not transmitted to the Senate when it approved a given treaty, "interpret" the treaty in a manner at odds with the Senate's earlier understanding. The President is bound by the Constitution to take care that the laws be faithfully executed, and to act on the basis of such an interpretation would breach that requirement.

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[13] Sofaer testimony, *supra* note 5, at 20.

[14] *Id.*

[15] Although the Senate's resolution of consent may contain no statement of understanding, there may be such statements in the report of the Senate Foreign Relations Committee or in the Senate debates. In such case, the President must decide whether they represent a general understanding by the Senate and if he finds that they do, must respect them in good faith. REVISED RESTATEMENT, *supra* note 1, § 314 comment d.

Such an act is thus not truly an "interpretation" at all — it is a violation of the Treaty Clause. When the President acts beyond the scope of his constitutional authority to interpret a treaty, he is in effect either amending that treaty or making a new one. The President cannot *call* a new treaty an "interpretation" of an old one and thereby dispense with the constitutional requirement of Senate advice and consent. Similarly, the President cannot *call* an amendment to a treaty an "interpretation" of that treaty and thus dispense with that requirement. The President's power of treaty interpretation is limited — limited by the Treaty Clause. The Constitution permits the President, acting alone, only to interpret existing treaties — not to make new ones. To remain within the scope of his constitutional power, the President must genuinely be engaged in the act of treaty *interpretation*. He cannot engage — by himself — in the act of treaty *creation*.

Where is the line drawn? Senate Resolution 167 drew the line in the same place as the Vienna Convention on the Law of Treaties and the *Restatement (Revised) of Foreign Relations Law*, which indicate that a treaty is to be construed in good faith in accordance with the ordinary meaning to be given its terms in light of its context and its object and purpose. When the President does this, he acts within the scope of his constitutional power. When the President's construction of a treaty cannot be so described, his endeavor represents not construction or interpretation at all, but the making of a new treaty. This he can do only with the advice and consent of the Senate.

Sound policy concerns support this conclusion. If the negotiating record were deemed controlling, the damage to the institution of the Presidency — and the conduct of American diplomacy — would be immeasurable. Hereafter the Senate would feel compelled to demand the negotiating record to every treaty to satisfy itself that nothing therein contradicted the public assurances of the Administration. Or, the Senate would feel compelled to incorporate into its approval of every treaty a reservation for every jot and tittle in the Administration's public statements as to what the treaty means, lest those statements later be disavowed in favor of a secret negotiating record. The impact on American diplomacy would be devastating. "Treaties so laden," as Senator Nunn put it, "would sink under their own weight. It would be extremely difficult to achieve bilateral agreements and virtually impossible for the United States to participate in multilateral treaties."[16] It could also mean the end of confidential treaty negotiations — a tradition that traces to the earliest days of the Republic and one widely thought to be essential to the candid exchange of views by negotiators.

Like all rules of interpretation, those set forth in the Vienna Convention, the *Revised Restatement*, and Senate Resolution 167 grey at the margins. Room exists for reasonable disagreement whether close fact cases fall on one side of the line or the other. But ambiguity on the fringe does not preclude clarity at the center. Some facts *do* fall clearly on one side or the other. That the President can interpret treaties alone does not mean that he can make or amend them alone. To "interpret" a treaty in a manner at odds with the original interpretation of the President and Senate that made the treaty is not to interpret it. To do so is to amend it, or to make another.

For this the President needs the Senate's consent.

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[16] Sen. S. Nunn, testimony before a joint hearing of the Senate Committee on Foreign Relations and the Senate Committee on the Judiciary, at 22 (Mar. 11, 1987) (unpublished Committee transcript on file with the *U.C. Davis Law Review*).